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PRIVACY IN THE FEDERAL BANKRUPTCY COURTS*

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INTRODUCTION

Since January, 1995, the Bankruptcy Court for the Western District of Oklahoma has been offering remote access to full electronic case files, dockets, claims registers and all documents. Technical discussions on design and implementation of the system were rigorous and involved many groups with interest in the bankruptcy system. Part of the discussion with each group concerned the extent and manner of access to the documents. Topics included the extent of information to be included in searchable debtor and creditor indexes and whether the information should be available on the Internet or through a more limited access dial-in system. The major issue of discussion concerned whether access to case files and pleadings should mirror today's accessibility to paper records as closely as possible or whether access levels should be changed to maximize use of the capabilities of today's technology. Because of the level of concern raised, we chose to provide only limited, dial-in access. The level of controversy over this topic has increased greatly

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since that time as other courts have begun providing access to electronic case records over the Internet. The specific issues being discussed in the bankruptcy community regarding access are not unique and have been ongoing for several decades in the private and public sectors and in other countries. Access to medical, tax, marketing, credit, banking, Social Security and driver's license records have all been the subject of discussion. Controversy over the breadth of information now collected by entities, including the courts, is only a portion of the debate. The majority of the concern with collection of personal information of the types listed above arises not from provision of the information in any one place, such as records collection in bankruptcy court, or for any one purpose, but from the proliferation of databases, called data warehouses, ease of access to those databases and the ability to combine information from several places using data mining to make a detailed profile of an individual.¹

Currently, access to bankruptcy records is limited absent electronic records. Reviewing information on a debtor requires a visit to the courthouse or obtaining copies of pleadings through a lengthy process of exchanging correspondence with the clerk's office. One can access information through a name search on a specific debtor or by having knowledge of a specific case number. Requesting information about random, unknown parties or requesting wholesale review of all cases is time and cost prohibitive. Therefore, people do not seek information randomly or on a wholesale basis, but only come into contact with the records of those known, specific individuals they are interested in. Easily searchable information on creditors or attorneys does not exist at all. These circumstances have provided a "practical obscurity" to the sensitive, personally identifiable information present in all bankruptcy cases.²

The competing access interests of those involved in bankruptcy cases have lain dormant until the prospect of altering the level of access to the information from this current practice became possible. The first concern regarding access brought to our attention involved the privacy interests of all parties identi-

1. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, MAKING GOVERNMENT WORK: ELECTRONIC DELIVERY OF FEDERAL SERVICES 144 (1993); FEDERAL TRADE COMMISSION, REPORT TO CONGRESS ON INDIVIDUAL REFERENCE SERVICES (1997); Presidential Directive on Privacy of Personal Information, Privacy and Personal Information in Federal Records, May 14, 1998, *available in* 1998 WL 241263; Glenn R. Simpson, *E-Commerce Firms Start to Rethink Opposition to Privacy Regulation as Abuses, Anger Rises*, WALL ST. J., Jan. 6, 2000, at A24.

2. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

fied in cases, including debtors, creditors and their respective attorneys. All of these groups wished that we provide as little public access to information specifically about them as necessary for the proper administration of a case and no more. While espousing an interest in protecting information pertaining to themselves, creditors and attorneys also expressed an interest in being provided unlimited access to information involving other creditors, attorneys and debtors. Finally, a third interest group, consisting of third parties not involved directly in any particular case, desired unlimited, wholesale access to information to evaluate the operation of the judiciary and effectiveness of the bankruptcy law, for collecting financial information for subsequent sale or to use for purposes other than the administration of a bankruptcy case. This group included news media, academia and commercial entities such as brokers, credit reporting companies, real estate title and abstract companies and lenders.

Answering the many questions concerning whether access to bankruptcy records should be altered from current practice, and if so how, requires looking at these issues within the context of the increase in information collected and disseminated across our global society. We are cognizant that any analysis must be aware of the larger issues of access in coming to terms with public access to court data. In most other contexts, the public, commentators and legislators have been asking that the reasons for collecting information and for providing access to it be reviewed first because "[t]he mere fact that a record has been public historically does not justify continued treatment without first examining the reasons behind the original policy."³

To begin the analysis, it is useful to identify the information being discussed and then look at the reasons why people are arguing over access to it. The discussion should then continue by identifying the interests of individual privacy and public access which are being espoused in general. These interests can then be explored by reviewing the history of access and privacy in court proceedings and records, and applying the concepts in the general debates on access to records in the federal courts. Finally, we will try to find a solution or solutions to the question of whether, and if so how, to alter access to bankruptcy information.

3. Bruce D. Goldstein, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185, 1213 (1992).

I. THE NATURE OF PERSONAL INFORMATION, COLLECTION AND DISSEMINATION

It is difficult to read any legal publication, or magazine and newspaper of general interest, and not find an article concerning the use of new technology to collect and disseminate personal information.⁴ The discourse is almost a frenzy. Most of the general interest literature details some horror story of lives hurt or ruined due to use of information about a person which was freely available to others without the person's knowledge.⁵

Commentators define personal information as any information which is linked or related to an individual through a commonly used, yet unique identifier.⁶ Records kept on individuals and entities which are linked by such an identifier are numerous and contain an amazing array of information concerning financial activity, criminal records, health records, employment information, geographic information, physical characteristics as well as one's beliefs and behavior.⁷ These records have been collected for many decades and often outlive their subjects.

4. See, e.g., Mark E. Budnitz, *Privacy Protection for Consumer Transactions in Electronic Commerce: Why Self Regulation is Inadequate*, 49 S.C. L. REV. 847 (1998); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998); T. Christopher McLaughlin et al., *Financial Institutions Fraud*, 35 AM. CRIM. L. REV. 789 (1998); Martha Brannigan, *Quintiles Seeks Mother Lode in Health "Data Mining"*, WALL ST. J., Mar. 2, 1999, at B4; Andrea Petersen & Matthew Rose, *Database of a Merged AOL Brings Cheers and Chills*, WALL ST. J., Jan. 14, 2000, at B6; Glenn R. Simpson, *Intuit Acts to Curb Leaks on Web Site*, WALL ST. J., Mar. 2, 2000, at A3.

5. See Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1159 (1997) (fraudulent use of Social Security Number caused five years of credit problems, theft of wallet resulting in identity theft and false arrest for murder and robbery, typographic error in data entry for credit bureau caused almost entire town to experience credit problems); Jon G. Auerbach et al., *Prying Eyes: With These Operators, Your Bank Account is Now an Open Book*, WALL ST. J., Nov. 5, 1998; Peter Lewis, *License Database Compromised: Online Paper Posted Wrong Access Codes on Web Site*, SEATTLE TIMES, Sept. 4, 1998, at B1; Peter Maas, *How Confidential are Your Personal Affairs*, PARADE MAGAZINE, Apr. 19, 1998; Joshua Quittner, *Invasion of Privacy*, TIME, Aug. 25, 1997; Thomas E. Ricks, *This Stealth Offense Turns Military Brass into Sitting Ducks*, WALL ST. J., Dec. 8, 1999, at A1 (detailing fraud obtaining credit cards in names of military officers whose names and social security numbers were placed on the Internet after being obtained through the Congressional Record); *Credit Card Numbers are Stolen by Hacker, Then Posted on Web*, WALL ST. J., Jan. 11, 2000, at B10.

6. See George Trubow, *The Development and Status of "Information Privacy" Law and Policy in the United States*, in INVITED PAPERS ON PRIVACY: LAW, ETHICS AND TECHNOLOGY (1981).

7. Regarding public sector record keeping, see Heyward C. Hosch, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 140 n.5 (1983). For private sector record keeping, see

While such a broadly defined list of records sounds innocuous and collection of this information has been relatively unchallenged in the past, the quantity and detail of information which can now be compiled on an individual from just a handful of record keepers is astounding. Information collected can easily give a profile of an individual including the following: name, personal photograph, age, sex, address, social security number, telephone number, names and information on family members, size and types of rooms in your home, satellite images of your neighborhood and street maps to your home, employment information, income, names of creditors, outstanding debts, arrests and convictions, tax liens, lawsuits referencing your name, books and publications read, hotels and casinos visited, medical products purchased, foods purchased at grocery stores, whether you hunt or fish and whether you are an officer of a business.⁸

The entities collecting this information are almost too numerous to list. It is safe to assume that anyone you come into contact with, except other individuals, is keeping records. Every type of government entity, whether local, municipal, state or federal, keeps computerized records. These entities maintain hundreds, probably thousands, of computerized databases on individuals. Recorders of deeds and liens, taxing authorities, schools and colleges, keepers of drivers license and voting records, various welfare and benefit providing agencies, law enforcement agencies, the postal service, libraries and the courts all keep records on individuals. Private entities keeping computerized records include: credit bureaus, banks, mortgage companies, stock brokers, news media, insurance companies, the Medical Information Bureau, hospitals, doctors and pharmacies, employers, churches, clubs, manufacturers, grocery stores, departments stores and list and information brokers.

We provide some information voluntarily when we fill out a form for a government entity, a warranty survey card, an applica-

Elizabeth deGrazia Blumenfeld, *Privacy Please: Will the Internet Industry Act to Protect Consumer Privacy Before the Government Steps In?*, 54 BUS. LAW. 349 (1999). See also David J. Klein, *Keeping Business Out of the Bedroom: Protecting Personal Privacy Interests from the Retail World*, 15 J. MARSHALL J. COMPUTER & INFO. L. 391 (1997).

8. See DAVID F. LINOWES, *PRIVACY IN AMERICA, IS YOUR PRIVATE LIFE IN THE PUBLIC EYE?* (1989); Sandra Byrd Petersen, *Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?*, 48 FED. COMM. L.J. 163 (1995); David Bank, *Know Your Customer*, WALL ST. J., June 21, 1999, at R18 (detailing techniques and uses of profiling); Blumenfeld, *supra* note 7, at 353; Gindin, *supra* note 5. Robert Gellman, *Who is Using IT the Most to Invade Our Privacy?*, GOV'T COMPUTER NEWS, Sept. 13, 1999; *Secret Service Financed License Photo Database*, DAILY OKLAHOMAN, Feb. 19, 1999; Charles J. Sykes, *Your Best Defense Against Big Brother: You*, WALL ST. J., Jan. 24, 2000, at A27.

tion for credit or when we answer a survey. In most instances, however, information is obtained without our knowledge or consent. A great deal of information is collected whenever a purchase is made using a grocery store shopping card, credit card, debit card or a check. Even borrowing a book from the library results in a record.⁹ Insurance companies receive information through interviews with neighbors and co-workers and in some instances through surveillance. Collection of information upon access to the Internet, through identification tags on computing chips and through "cookies," is a new source of acquiring information. Finally, information is acquired by third parties from the original collectors. Many government agencies receive information from private entities complying with statutory reporting requirements.¹⁰ In the private sector, most information is acquired by third parties through sales from the original collectors, including stores, financial institutions, credit card companies and government agencies.¹¹

Government uses of personally identifiable information fall in four main areas: law enforcement, tax collection, benefit program payment and tracking and various regulatory applications and enforcement. Various federal, state and local law enforcement entities are performing increasing data warehousing and data mining of multiple data bases to perform criminal activity monitoring and criminal profiling and tracking.¹²

The list of uses of such information in the private sector is long:

- Solicitation of contributions for charitable or political organizations;
- Location of persons and assets for debt collections;
- Product and service market research and sales;
- Medical research;
- Sociological and economic research;
- Determination of employment eligibility;
- Determination of housing eligibility;
- Dispensing medical, legal and other professional advice.

The largest uses in the private sector involve credit and sales. Entities use the information they collect or purchase to determine buying preferences for direct mail marketing and to evalu-

9. See A. Michael Froomkin, *Flood Control on the Information Ocean: Living With Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 486 (1996).

10. See *id.*

11. See *id.*

12. See *id.* at 489.

ate an extension of credit. The second largest use of information again relates to commerce, generally debt collection, by list and information brokers to private investigators, lawyers and insurance companies.

While most of these uses are arguably to the benefit of society and individuals, harmful and illegal uses of this information are becoming more common. Identity theft and stalking are two areas where the ease of access to detailed personal information has hurt a growing number of people. Identity theft allows the perpetrator to steal from creditors often harming the lives of their innocent victims in addition to the theft from the creditor.¹³ Some identity thieves commit more violent crimes including burglary and murder virtually anonymously under the identity of another.¹⁴ Further, stalkers have murdered victims using detailed information on their residences and habits found by compiling information from easily accessed information sources such as drivers license databases.

Prior to changes in technology and society contemporaneous with the Civil War, individuals were anonymous except to those they knew personally. Few records were kept and one functioned in a society where decisions and activities were based on personal observations.¹⁵ In the late 1800s and early 1900s, population grew and people moved to cities. Transactions and activities were based less on personal observations and relationships and more on recorded information which was available only to the recorder.¹⁶ In spite of the amount of information collected, this "practical obscurity" gave the appearance of privacy protected.¹⁷ Over the last thirty years, technology, and the ever more intense collection of personal information, has caused one's life to become an open book. Until the last fifteen years, gathering all of the information cited earlier in one compilation was prohibitive in cost and time unless the person concerned was a public figure. Some of the information discussed, such as purchases at a grocery store, was not available in any record.

13. See *supra* note 5. See also Sandra T. M. Chong, *Data Privacy: The Use of Prisoners for Processing Personal Information*, 32 U.C. DAVIS L. REV. 201 (1998); Kristen S. Provenza, *Identity Theft: Prevention and Liability*, 3 N.C. BANKING INST. 319 (1999); Maria Ramirez-Palafox, *Identity Theft on the Rise: Will the Real John Doe Please Step Forward?*, 29 McGEORGE L. REV. 483 (1998); Margaret Mannix, *Getting Serious About Identity Theft*, U.S. NEWS & WORLD REP., Nov. 8, 1999, at 88.

14. See *supra* note 13.

15. See PERSONAL PRIVACY STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION AGE 1-2 (1977).

16. See *id.* at 2.

17. U.S. Dep't of Justice v. Reporter's Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

While one may object to the acquisition and use of information, it is clear that some information must be collected and used for the activities of our society to function.¹⁸ The problem, in essence, involves the interplay between the functioning of a person within society and everyone's need to withdraw from society at times and in different ways.¹⁹ The objections by commentators, legislators and the public on electronic access to information are twofold. First, they are concerned about the proliferation of unknown and unauthorized use of the information in ways unrelated to the purpose for which it was first collected.²⁰ They are asking also that the original collectors of the information provide support for what is collected, in particular, they object to the collection of too much information, that which is inappropriate and irrelevant for the activity or transaction it is collected for.²¹

The proliferation of these invasions on electronic information are keyed to a relationship which identifies all information as belonging to a specific individual. In the United States, the unique, universal identifier is the social security number. Indeed, in the report of the Senate committee marking up the Privacy Act of 1974, the use of social security numbers was cited as "one of the most serious manifestations of privacy concerns in the nation." In the twenty-five years following that report, the problems of linking personal information together using social security numbers has only worsened.

It is this link, along with technology, which has brought the issue to the fore.²² While in the past, the information on what groceries one bought, the progression of residences one lived in and one's financial history did not seem sensitive it does appear

18. See PAUL M. SCHWARTZ & JOEL R. REIDENBERG, *DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION* 37 (1996); W. Ware, *A Taxonomy for Privacy*, in *INVITED PAPERS ON PRIVACY: LAW, ETHICS AND TECHNOLOGY* 27 (1981)).

19. See SCHWARTZ & REIDENBERG, *supra* note 18, at 37-39.

20. See FEDERAL TRADE COMM'N., *STAFF REPORT ON THE PUBLIC WORKSHOP ON CONSUMER PRIVACY IN THE GLOBAL INFORMATION INFRASTRUCTURE* (1996); BOARD OF GOVERNORS, FED. RESERVE SYSTEM, *REPORT TO CONGRESS CONCERNING THE AVAILABILITY OF CONSUMER IDENTIFYING INFORMATION AND FINANCIAL FRAUD* (1997); MARY J. CULNAN, *PRIVACY AND THE TOP 100 WEB SITES: A REPORT TO THE FEDERAL TRADE COMMISSION* (1999); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive News-gathering and What the Law Should Do About It*, 73 TUL. L. REV. 173 (1998).

21. See *supra* note 20.

22. See Thomas B. Kearns, *Technology and the Right to Privacy: The Convergence of Surveillance and Information Privacy Concerns*, 7 WM. & MARY BILL RTS. J. 975 (1999); Leslie A. Kurtz, *The Invisible Becomes Manifest: Information Privacy in a Digital Age*, 38 WASHBURN L.J. 151 (1998).

from the great amount of commentary that the public always considered this information sensitive. The news articles and various surveys and studies have the theme that individuals thought this sensitive information was protected, they want it to continue to be protected and something should be done to protect it again.

The public is being heard through the media on the issue of what comprises sensitive information. Reviewing these articles indicates that any financial or medical information is considered sensitive. Federal and state areas of legislation also provide insight as to what information has been considered sensitive.²³ Two long standing pieces of legislation, the Freedom of Information Act and the Internal Revenue Code, provide protections for sensitive information collected by public agencies linked to specific individuals.²⁴

The public has only recently begun to voice a concerted disapproval of use and access to information linked to social security numbers.²⁵ Social security numbers are collected and referenced almost daily for every person in this country and related to some activity or commercial transaction.²⁶ This relation of a product or service purchased, bank transaction, medical visit or government record to a social security number later allows the detailed profiles referenced earlier to be compiled. Even the charitable act of donating blood generates a record

23. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 1997 OVERVIEW (1997); CRIMINAL HISTORY RECORD INFORMATION: COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION (1992); George Trubow, *The Development and Status of "Information Privacy" Law and Policy in the United States*, in INVITED PAPERS ON PRIVACY: LAW, ETHICS AND TECHNOLOGY (1981). See also Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-318, 112 Stat. 3007 (codified in scattered sections of 18 and 28 U.S.C.); Financial Information Privacy Act of 1999, S. 187, 106th Cong. (1999).

24. See Flavio L. Komuves, *We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 151-53 n.146 (1998). In response to the recent publication of concerns about confidentiality, the Driver's Privacy Protection Act was enacted. See 18 U.S.C. §§ 2721-2725 (1994 & Supp. IV 1998). The Act is very controversial, but seeks to protect personal information with links to any specific individual. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998). Specifically, photographs, social security numbers, license plate numbers, name, address, phone number, and medical and disability information is protected from disclosure. Any information on driving records or information related to the operation of the state agency is not protected.

25. See Komuves, *supra* note 24.

26. See *id.* at 536-49.

relating a person's name and any diseases to a social security number.²⁷

This is the context in which the debate over collection and disclosure of information in bankruptcy records is set. The information collected at the bankruptcy court includes almost every type of information being discussed in the media, in legislation discussed earlier and information which has been deemed sensitive in other contexts for many years by federal and state legislation.

Bankruptcy records add to the detail of the information collected from the other sources mentioned previously, and provide an increased ability to corroborate information held in these other databases for profiling purposes. The bankruptcy petition requires a debtor to list in detail all assets and the whereabouts of each asset. This list includes the name, address and account numbers for all types of bank, credit union and brokerage house assets. It also requires a detailed list of all debts owed, to whom owed, the amount and the consideration for the debt. Further information is required on current and past lifestyle circumstances, including residences and employment for the three years previous to filing bankruptcy. A cash flow statement is required detailing all current sources of income as well as a comprehensive listing of expenses, thus providing a very revealing picture of a person's lifestyle both prior to and upon filing. All of this information is related to an individual or entity through their social security or tax identification number, which is required to be provided on the petition. In some jurisdictions, the social security or tax identification number of the debtor is required by local rule to be present on any document filed with the court.²⁸ Clearly, the bankruptcy process is a very intrusive gatherer and disseminator of personal information and is part of the debates on public access to such information.

II. NATURE OF PRIVATE AND PUBLIC INTERESTS IN INFORMATION ABOUT INDIVIDUALS

The individual interest in privacy is called upon to protect various types of activities a person engages in as well as for various types of property owned by an individual. Generally, there are three aspects to privacy: 1) privacy from physical intrusion by others, 2) privacy with regard to one's own actions, and 3) infor-

27. See *id.* at 538.

28. See N.D.N.Y. L.R. 9004-2; D. Colo. L.B.R. 105; S.D. Iowa Bankr. R. 5; D. Kan. L.B.R. 1005.2; D.S. D. L.B.R. 9004-2.

mational privacy.²⁹ The first aspect, privacy from physical intrusion by others, is, at least theoretically, protected by the Fourth Amendment for intrusions by the government³⁰ and by statutory provisions, to include prohibitions against trespass, and by tort law for intrusions by private parties.

The second aspect is protected by, inter alia, a number of U.S. Supreme Court decisions which had their genesis with the decision of *Griswold v. Connecticut*.³¹ These include: the right to choose a marriage partner,³² the right to use contraceptives,³³ the right to watch obscene movies,³⁴ the right to have an abortion,³⁵ the right to choose who lives in a house,³⁶ and the right to engage in sexual relations (but not homosexual relations).³⁷

This right has also been held to include the right to educate one's children.³⁸ However, this right was established well before *Griswold*.

The third aspect, informational privacy, is more problematic and the focus of this article. It is generally defined as a limitation upon the ability of another to gain, disseminate, or use information about oneself.³⁹ In the context we are examining, it can be stated broadly as a notion or idea of privacy in personal information and identity.

The extent and history of the contemporary concept of privacy or confidentiality in various types of information about individuals extends back over 100 years. Definitions of the interests expounded are amorphous. The first express reference to a right to personal or domestic privacy came from Judge Cooley and was quoted by Justice Brandeis in his seminal article on the

29. See JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS AND THE RISE OF TECHNOLOGY 60 (1997); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989).

30. See *Katz v. United States*, 389 U.S. 347 (1967) (holding that a violation of the Fourth Amendment does not involve a question of a physical trespass, but involves a reasonable expectation of privacy).

31. 381 U.S. 479 (1965).

32. See *Loving v. Virginia*, 388 U.S. 1 (1967).

33. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); see also *Carey v. Population Servs. Int'l*, 431 U.S. 78 (1977).

34. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

35. See *Roe v. Wade*, 410 U.S. 113 (1973).

36. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

37. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

39. See ABA, REPORT ON THE NATIONAL SYMPOSIUM ON PERSONAL PRIVACY AND INFORMATION, SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES 5 (1981); Rubenfeld, *supra* note 29, at 740.

subject.⁴⁰ Since that time, the debate over this subject has grown, rising in the last thirty years to its current level concomitantly with changes in technology.⁴¹

Although 100 years old, Justice Brandeis's writings as regards the concept of privacy are still cogent:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." . . . The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise.⁴²

Since Justice Brandeis's time, however, technology has only increased its assault on privacy.

Numerous arguments have been advanced as justifications for the right of privacy. Three of the basic philosophical arguments for a right of privacy are: 1) it is necessary for intimacy and social relationships, 2) it is necessary for personhood, and 3) it is necessary for liberty.

The intimacy and social relationship position, generally, takes a psychological, as opposed to political, approach to the right of privacy. This position holds that without privacy, there can be no intimate or social relationships.⁴³ Although philosophically and psychologically appealing, this argument provides little in the way of support for a legal argument of the existence of a right of informational privacy.

The argument that privacy is necessary for the existence of human beings as "persons" appears to provide little more in support. This argument states that privacy is an essential element

40. See THOMAS M. COOLEY, *TREATISE ON THE LAW OF TORTS* 29 (1878); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

41. See PRIVACY PROTECTION STUDY COMM'N, *PERSONAL PRIVACY IN AN INFORMATION SOCIETY* (1977); SECRETARY'S ADVISORY COMM. ON AUTOMATED PERSONAL DATA SYS., U.S. DEP'T OF HEALTH, EDUC & WELFARE, *RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS* (1973); *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong. (1971); *The Computer and Invasion of Privacy: Hearings Before the Special Subcomm. on Invasion of Privacy of the House Comm. on Gov't Operations*, 89th Cong. (1966).

42. Warren & Brandeis, *supra* note 40, at 195, 213.

43. See Robert S. Gerstein, *Intimacy and Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY* 265 (Ferdinand David Schoeman ed., 1984); James Rachels, *Why Privacy is Important*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY*, *supra*, at 290.

for a human being to develop a sense of self and become and remain a person, in the developmental sense of the word.⁴⁴ Of course, the definition of "person" is difficult to grasp but is most rationally interpreted in accordance with the philosophy of Immanuel Kant, that a person is an end unto himself.⁴⁵

Closely related to this argument is the claim that privacy is an essential element of human dignity. It is privacy which permits human beings to be an individual.⁴⁶ As such, human dignity provides the link between becoming and remaining an individual person (i.e., personhood) and the political and legal concept of liberty, which is the final argument presented in support of the existence of a right of informational privacy.

This last position, that privacy is necessary for liberty, provides the greatest degree of support for a legal argument of the existence of a right of informational privacy. The essence of this position is that privacy promotes liberty. Indeed, individual privacy is required for freedom, else tyranny would result.⁴⁷ Privacy encourages learning and free inquiry which is the essence of Immanuel Kant's personal autonomy so essential to the value of a human being as a person, in the highest sense of the word. The lack of privacy invites critical examination which lessens respect for others. Privacy, in essence, promotes liberty.⁴⁸ And it is liberty and individuality which are the fundamental political and legal values of the Constitution and the Bill of Rights.

Thus, any analysis of a right of informational privacy must be considered to have significant philosophical value as a liberty interest, which is the fundamental premise of the Constitution and the Bill of Rights. However, at least one author is of the opinion that fundamental rights carry a much greater value than just a liberty claim in any legal analysis, as demonstrated by the application of the "strict scrutiny" test.⁴⁹

44. See Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 300.

45. See IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* (Thomas K. Abbott trans., 1954) (1785).

46. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 156. See also ALAN F. WESTIN, *PRIVACY AND FREEDOM* 32-39 (1967).

47. See LINOWES, *supra* note 8, at 179 (noting that in any totalitarian state, the first right to disappear is the right of privacy).

48. See Stanley Benn, *Privacy, Freedom and Respect for Persons*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 223; Ruth Gavison, *Privacy and the Limits of Law*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 43, at 346. See also WESTIN, *supra* note 46, at 23-26, 32-39.

49. See DECEW, *supra* note 29, at 80.

Commentators, defining the universal concerns of the individual in privacy, have identified four privacy interests specific to individuals supplying information on their personal affairs, all related to the benefit to the individual derived from releasing the information. These are, relevancy of information collected, accuracy of information as entered originally and subsequently maintained by the record-keeper, necessity of the original, restricted uses for the information, and limitations on subsequent disclosure to third parties.⁵⁰

The interests of the public relative to the activities, property and information about individuals is reflected in the interests of a democratic government. These interests are composed of two competing elements. First, society as a whole has an interest in privacy of the individual.⁵¹ When our society is no longer governed by individuals, but by a homogenous mass, democracy ceases to exist.⁵² A more philosophical expression of this idea is eloquently stated by Mahatma Gandhi, "If the individual ceases to count, what is left of society?"⁵³

Second, the nature of democratic government by the people requires that there be few limits on access to public records.⁵⁴ The reasoning behind this requirement is stated well by the founders of this country. The governed must police the state to stop fraud, waste and oppression.⁵⁵

Although this philosophy underlies the formation of this country, there are few express requirements for government record keeping and publication of information in the Constitution. As regards the courts, the requirements for open records and proceedings in criminal prosecutions is found under the Constitution, in bankruptcy matters under statute and in civil cases under the common law. This interest has been discussed for all types of proceedings as a need for the public to assure proceedings are conducted fairly, and that perjury, misconduct and decisions based on secret bias are discouraged.⁵⁶

Further, society needs information to function; therefore, any action which chills the willingness of persons to provide information hurts society. In addition to chilling effects on col-

50. See Horsch, *supra* note 7, at 141 n.11; Trubow, *supra* note 6.

51. See LINOWES, *supra* note 8, at 12-14.

52. See RUBENFELD, *supra* note 29, at 805.

53. LINOWES, *supra* note 8, at 14.

54. See Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30-32 (1990).

55. See *id.*

56. See *Press Enter. Co. v. Superior Court of California*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

lection, the point can be made that when personal information becomes easy to misuse and inaccurate, then eventually there will come a point when no one can rely on the information given and functions of society will be hampered. For example, if a lender cannot rely on the information provided to it from an applicant and outside sources, due to identity theft or inaccuracies in data maintenance, it will incur too great a risk in lending and will curtail lending.

A. *Protection of Individual Interests.*

This portion of the paper discusses privacy and protections of the individual, the next portion discusses the interests and protection of those on the other side of the debate. The collection of statutes, common law and claimed constitutional protections for various types of activities, property and rights in one's body, person and information are thin. The extension of specific legal sources of protection to personal information collected by public sector and private sector records keepers is tenuous or riddled with loopholes and exemptions. This hodgepodge of laws reflects the unsettled nature of the debate as to the bounds of privacy in personal information.

For this section, "private interests" will be defined to mean those interests which belong to or can be claimed by a private individual. Although artificial entities, such as corporations, can be construed to be "private," their unique status as creatures of statute with, inter alia, limited protections, indicates they should not be considered here.

Further, in addition to the federal provisions, there are numerous protections at the state level. As this article concerns the federal bankruptcy courts and the state protections are varied and numerous, these state protections will not be addressed.

1. Constitutional

The Fourth Amendment, which prohibits unreasonable searches and seizures, is considered to be the foundation for privacy protections. Although it was, initially, considered to only apply to physical intrusions,⁵⁷ in *Katz*, the Supreme Court expanded its scope to include interests where there is a "reasonable expectation of privacy."⁵⁸ This decision laid the groundwork for the recognition of the right of informational privacy.

57. See *Olmstead v. United States*, 277 U.S. 436 (1928).

58. *Katz v. United States*, 389 U.S. 347, 360-61 (1967).

Since *Katz*, the Supreme Court, in *Whalen v. Roe*,⁵⁹ explicitly recognized the threat to privacy by the accumulation of large amounts of data and, thereby, implicitly recognized the right to informational privacy. However, the right must be balanced by competing interests.⁶⁰ In *Whalen*, the Supreme Court recognized a legitimate interest of the state in collecting certain data.

It must be mentioned that the Fourth Amendment is not the only constitutional source of the right to privacy. In *Griswold*, the Supreme Court acknowledged the Ninth Amendment and the penumbra of the Bill of Rights as constitutional authority to acknowledge the right of privacy.⁶¹ However, constitutional protections of privacy only apply against the government and not against individuals.

Defining the scope of constitutional privacy rights is a difficult task. There is no doubt that fundamental privacy includes such issues as contraception, child rearing and education, family relationships, and who to marry. However, the Supreme Court has recognized that the outer limits of the constitutional right to privacy have not been defined.⁶²

2. Common Law

The common law tort of invasion of privacy provides protection against violations of privacy where the Constitution does not. Four separate torts are recognized: 1) placing a person in a false public light, 2) intrusion into a person's solitude, 3) public disclosure of private facts, and 4) appropriation of a person's name or likeness.⁶³

These four torts do not adequately address the concerns of informational privacy. The tort of false light requires that the information be false and be made public. The tort of intrusion is usually applied to actual intrusions and must be offensive to the

59. 429 U.S. 589 (1977) (holding, however, that the Fourteenth Amendment does not protect the right of privacy).

60. For example, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court held that the constitutional right of free press outweighed the statutory and common law right to privacy where the name of a rape victim had already been announced in a public court proceeding. In an even more interesting case, the Court of Appeals for the Sixth Circuit held that even if documents are prohibited from disclosure by the Freedom of Information Act, if they are entered into court records, the court is not required to place them under seal. See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983).

61. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

62. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1976).

63. See Restatement (Second) of Torts §652A (1977); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

reasonable person. The tort of public disclosure required disclosure to the public at large and not just a few people. The tort of appropriation is usually applied in the context of advertising.⁶⁴ Each of these torts do not address the problem of informational privacy which includes the additional concerns of obtaining, maintaining, and privately communicating personal information. However, one author recognizes that these four torts do, at least, provide the basis for causes of action for violation of information privacy.⁶⁵

3. Statutory

Statutes provide, perhaps, the most powerful tool for the protection of private interests, depending, of course, on the scope of wording.

a. *Fair Credit Reporting Act*⁶⁶

This Act restricts private entities in the credit reporting industry to releasing information only to those entities it reasonably believes have a legitimate business need for the information (i.e., such as evaluation of credit worthiness, employment, insurance, etc.). However, the term "legitimate business need" has been characterized by at least one author as a "broad loophole."⁶⁷ Thus, although the law purports to protect private interests, it is, in practice, almost meaningless.

b. *Privacy Act of 1974*⁶⁸

This Act restricts the federal government's actions with regard to the information it collects. The government cannot release a written record without written consent unless certain circumstances exist. These circumstances include "routine use," law enforcement purposes, and protection of the health and safety of an individual. However, the provisions of this Act do not restrict private individuals.

This Act was amended by the Computer Matching and Privacy Protection Act of 1988.⁶⁹ This amendment allows government agencies, within certain written guidelines, to compare computerized records to establish or verify eligibility for benefits or to recoup payments on benefits. It also allows comparison for

64. See Petersen, *supra* note 8.

65. See Gindin, *supra* note 5.

66. 15 U.S.C. §§ 1681-1681t (1998).

67. Petersen, *supra* note 8, at 181.

68. 5 U.S.C. § 552(a) (1994).

69. 5 U.S.C. § 552(a) (1994).

personnel and payroll purposes. However, law enforcement, tax collection, and foreign counter-intelligence purposes are not covered by the amendment.

*c. The Family Educational Rights and Privacy Act of 1974*⁷⁰

This Act limits access to the educational records of students.

*d. The Right to Financial Privacy Act of 1978*⁷¹

This Act restricts the government's access to financial information held by an institution concerning a private individual without the person's consent or a valid warrant, subpoena, or summons. Further, any such release of information must be for law enforcement purposes and the person must be notified of the release.

*e. The Computer Fraud and Abuse Act of 1986*⁷²

This Act provides for the protection of financial records at financial institutions. Entities who have suffered economic damage may initiate a cause of action under this statute. The mere release of a virus into the Internet will constitute a violation under this law.⁷³

*f. Electronic Communications Privacy Act of 1986*⁷⁴

This Act amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968. It protects against the unauthorized access, interception, or disclosure of private electronic communications by the government or private persons. The government is required to obtain a warrant before doing so. However, there are exceptions. One is that the communications service may disclose information to a law enforcement agency if the communication appears to involve a crime. Another is for communications which are readily accessible to the public (i.e., the Internet). And another is for interception and disclosure in the ordinary course of business, which courts have ruled include the monitoring of employees.⁷⁵

70. 20 U.S.C. §§ 1221, 1232(g) (1998).

71. 12 U.S.C. §§ 3401-3422 (1994).

72. 18 U.S.C. § 1030 (1994).

73. See *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991).

74. Pub. L. No. 99-508, 100 Stat. 1848 (1994) (codified as amended in scattered sections of 18 U.S.C.).

75. See, e.g., *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986).

g. *Video Privacy Protection Act of 1988*⁷⁶

This Act restricts the release of information concerning the videos that an individual rents. A similar provision applies to the release of information concerning the viewing habits of subscribers to cable television.⁷⁷

h. *Driver's Privacy Protection Act of 1994*⁷⁸

This Act limits the release of information held by state departments of motor vehicles. This statute, however, has two loopholes: one for private investigators and another when drivers are given clear and conspicuous notice of possible disclosures on application and renewal forms.

i. *Internal Revenue Code*⁷⁹

The I.R.S. is limited in releasing information gathered and maintained for tax purposes. Generally, tax returns and associated information are confidential. There are a number of exceptions which include release of information to: 1) state tax authorities, 2) Congress, 3) the President, 4) law enforcement agencies, and 5) courts.

j. *The Freedom of Information Act*

Under the Freedom of Information Act, there are a number of recognized exceptions to the access of government information. Two of these exceptions encompass the release of information which would constitute an unwarranted invasion of personal privacy. These two exceptions focus on personnel, medical, and law enforcement records.⁸⁰ In these situations, the courts will balance the interests of revelation with the interests of privacy.⁸¹

k. *Social Security Numbers*

Much discussion has been generated over the need to keep social security numbers private. The Ninth Circuit has indicated that there is a right to informational privacy, although this decision has not resulted in widespread judicial recognition.⁸² Although this decision could be used as a basis for not revealing

76. 18 U.S.C. §§ 2710-2711 (1994).

77. See Cable Communications Policy Act, 47 U.S.C. § 551 (1994).

78. 18 U.S.C. §§ 2721-2725 (1994).

79. 26 U.S.C. § 6103 (1998).

80. See 5 U.S.C. § 552(b)(6) & (7) (1994).

81. See *Hoch v. C.I.A.*, 593 F. Supp. 675 (D. D.C. 1983).

82. See *Davis v. Bucher*, 853 F.2d 718, 719 (9th Cir. 1988); but see *In re Crawford*, 194 F.3d 954 (9th Cir. 1999), cert. denied, 120 S.Ct. 1244 (2000).

the social security number in bankruptcy proceedings, a number of bankruptcy courts do not follow this reasoning.⁸³

Although Section 7 of the Privacy Act restricts the use of the social security number by the government, there are so many exceptions to the mandate, that the restriction is essentially useless.⁸⁴ Although the law allows a person to refuse to divulge the social security number, where such divulgence is not mandatory, with no loss of benefits; this provision does not apply in the bankruptcy courts as divulgence is considered mandatory.⁸⁵

In light of these proscriptions, one must ask whether it is appropriate (or legal) for the executive branch to be held to standards of privacy which are not applicable to the judicial branch? Although it may very well be statutorily legal for the bankruptcy courts to disclose certain sensitive personal information (i.e., social security numbers⁸⁶), does such disclosure meet the demands of public policy? Does revealing the social security number in a "plain vanilla" bankruptcy case further any significant or compelling public interests or does doing so actually violate other, more vital, interests—such as informational privacy? For reasons of consistency, it would seem that the social security numbers should not be revealed, unless other overriding factors are present (i.e., the social security number is an element of the crime to be proven).

l. Other Statutes

The issue of individual privacy is clearly paramount in today's society. This is especially true of informational privacy. Numerous bills have been presented in Congress in recent years to protect informational privacy.⁸⁷

83. See *In re Anderson*, 159 B.R. 830, 838-39 (Bankr. N.D. Ill. 1993).

84. See Komuves, *supra* note 24, at 569.

85. See 11 U.S.C. § 342(c) (1994). See also FED. R. BANKR. P. 1005; *In re Anderson*, at 838-39.

86. A number of courts have held that bankruptcy petition preparers do not have a fundamental right to refuse to disclose their social security numbers in the face of 11 U.S.C. § 110(c) (1994), which requires that they do so. See *In re Adams*, 214 B.R. 212 (B.A.P. 9th Cir. 1997); *In re Rausch*, 213 B.R. 364 (D. Nev. 1997). See also *In re Adair*, 212 B.R. 171 (Bankr. N.D. Ga. 1997) (holding that the Privacy Act is not grounds for a debtor to refuse to disclose his social security number in violation of FED. R. BANKR. P. 1005). Indeed, the *Rausch* court noted that several other courts have held that there is no fundamental privacy right to refuse to disclose a social security number. See *Rausch*, 213 B.R. at 367 (citing *McElrath v. Califano*, 615 F.2d 424, 441 (7th Cir. 1980); *Doyle v. Wilson*, 529 F. Supp. 1343, 1348 (D. Del. 1982).

87. See Gindin, *supra* note 5, at 1217-18.

B. *Protections of Public Interests*

As stated previously, two groups claim interest in information about individuals. We have just visited the claims of the individual to privacy in his or her personal information. We now visit the claimed "need to know" of the public in that same information.

It is difficult to define "public interest." As a general matter, public interest has been defined as something in which the community at large has an interest or something which affects the rights or liabilities of the public. It does not include those things which are the object of mere curiosity or things which only involve particular localities. Matters of public interest include the affairs of local, state, and national governments.⁸⁸

The question remains, then, who defines the public interest in personal information? In practice, the legislature,⁸⁹ the executive,⁹⁰ and the courts⁹¹ all have the authority, to differing degrees depending upon circumstances, to define what is in the public interest. However, when the courts decide what is in the public interest, they usually employ a balancing test. Moreover, any test of what is in the public interest is a flexible standard.⁹²

The primary statutory expression of the public interest of access to government information is the Freedom of Information Act.⁹³ Its purpose is, generally, that the records of government agencies are open to public inspection. The philosophical basis of this statute is that for a democracy to flourish and for the people to trust government, there must be open access to the activities of government.⁹⁴

However, there are several statutory exceptions to access to information in government records. These include: 1) national security and foreign affairs, 2) internal agency personnel procedures, 3) information specifically excluded by statute, 4) trade

88. See *Russell v. Wheeler*, 439 P.2d 43, 46 (Colo. 1968); *Burgum v. North Dakota Hosp. Serv. Ass'n*, 106 N.W.2d 545, 547 (N.D. 1960); *Glenn County Attorney v. Crockett County Assessor*, 220 P. 816, 817 (Okla. 1922).

89. See, e.g., *Pan Am. Airways v. United States*, 371 U.S. 296, 308 (1963).

90. See, e.g., *Standard Oil Co. v. United States*, 337 U.S. 293, 311 n.14 (1949).

91. See, e.g., *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 221 (1965).

92. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981).

93. 5 U.S.C. § 552 (1994).

94. See Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 545 (1993) (quoting Thomas Jefferson and James Madison).

secrets and commercial or financial information, 5) inter or intra-agency memos which would only be available to other agencies involved in litigation against that agency, 6) personnel and medical files where revealing them would constitute a clearly unwarranted invasion of personal privacy, 7) law enforcement records where revelation would interfere with enforcement proceedings, deprive a person of the right to a fair trial, constitute a clearly unwarranted invasion of personal privacy, reasonably to be expected to reveal a confidential source, reveal law enforcement techniques or procedures, or place a person in physical danger, 8) information related to the regulation or supervision of financial institutions, and 9) geological and geophysical information.⁹⁵ These exceptions provide statutory protection for the enumerated public interests.

The Freedom of Information Act, however, does not apply to the courts because the courts are not considered an "agency" for the purposes of the Act.⁹⁶ But this does not mean that the Freedom of Information Act is useless concerning the issue examined in this article. Even though it does not apply to the courts as a matter of law, it can be a guide for establishing policy. As a matter of public policy, the United States Supreme Court would likely recognize and indeed has already recognized some of these exceptions as applying to court records to prevent the release of sensitive information.⁹⁷

The Freedom of Information Act expressly recognizes the significant public policy interest in open government records, which, in a free society, is essential.⁹⁸ However, the Act also expressly recognized, in its exemptions, that personal privacy is an individual private interest which can trump the public interest.⁹⁹ In such a situation, it would seem likely that the enumerated public interests would take precedence over individual privacy interests, although there are notable exceptions such as rape shield statutes.¹⁰⁰

Another protection as a balancing interest in the consideration of public interests is government efficiency. In the context

95. See 5 U.S.C. § 552(b) (1994).

96. See 5 U.S.C. § 551(1)(B) (1994). See also *In re Adair*, 212 B.R. 171, 173 (Bankr. N.D. Ga. 1997).

97. Consider, for example, the judiciary's well known refusals to release the identities of confidential informants and the courts' refusal to divulge national security information.

98. See *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1975); *EPA v. Mink*, 410 U.S. 73, 79-80 (1973).

99. See 5 U.S.C. § 522(b)(6) & (7) (1994).

100. See, e.g., MICH. COMP. LAWS ANN. § 750.520j (West 1999).

of the First Amendment, government efficiency has been recognized as a factor to be considered.¹⁰¹ Considering that the First Amendment concerns the dissemination of information, these authorities could be analogized to the public nature of judicial records. Additional support for this argument of government efficiency is found in the bankruptcy statutes which mandate the disclosure of the social security number.¹⁰² Thus, it could be argued that there is a general public interest in everyone having a national identifying number, thus, providing some support for the use of social security numbers in public documents such as bankruptcy petitions as a means to notify potential creditors and to properly and accurately identify the debtor.¹⁰³ Thus, the efficiency argument is closely related to the purposes espoused in the bankruptcy statutes—proper notification of creditors of the accurate identity of the debtor.

Another interesting protection of the public interest is the Computer Fraud and Abuse Act.¹⁰⁴ This statute appears to have some indirect conflict with the purpose of the Freedom of Information Act and the judicial policy of open records. Where the Freedom of Information Act is based on the policy of open records, the Computer Fraud and Abuse Act criminalizes the mere unauthorized access of a government computer.¹⁰⁵ Thus, information that belongs in the public domain and which is accessed in a government computer without authorization is a criminal act. In this sense, it appears that greater emphasis is being placed upon government authority and procedure than

101. See, e.g., *Waters v. Churchill*, 511 U.S. 661, 675 (1994); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in judgment); Bunker, *supra* note 94, at 554 (discussing the balancing of the right to access government information with the public interest of government efficiency).

102. At least one bankruptcy court has acknowledged that the Freedom of Information Act is not proper grounds for requesting that the social security number not be released. See *In re Adair*, 212 B.R. 171 (Bankr. N.D. Ga. 1997).

Further, despite all the recent public concern expressed over the privacy issues associated with disclosure of social security numbers, at least one court has held that there is no fundamental right to privacy in a social security number. See *In re Rausch*, 213 B.R. 364, 367 (D. Nev. 1997); Komuves, *supra* note 24 (discussing the use of the SSN as a national identifier as gaining more and more acceptance both by government agencies and private entities).

103. See 11 U.S.C. § 342(c) (1994). See also FED. R. BANKR. P. 1005; *In re Anderson*, 159 B.R. 830, 838-39 (Bankr. N.D. Ill. 1993).

104. 18 U.S.C. § 1030 (1994).

105. See *United States v. Sablan*, 92 F.3d 865, 868 (9th Cir. 1996).

upon the policy of open records.¹⁰⁶ Thus, as almost all governments records are now computerized, it would seem that there are public interest protections for all records, depending upon the mode of access and whether access is authorized.

In sum, there are numerous protections for public interests. The difficult aspect for any tribunal will be deciding whether the claimed public interest is, in fact, a public interest such that it should override a private interest.

III. AVAILABILITY OF INFORMATION FROM THE FEDERAL COURTS: CURRENT LAW AND REASONING

So far, our discussion has identified a growing problem in society as a whole with the extent of information collection and the intrusive use and misuse of that information. Concomittantly with the increase in information dissemination, there has been an increase in the debate between the interests of individuals and the interests of the public in that information. In this context, lies the growing debate regarding access to the information presented to and filed with the courts. Most precedent in this area is found at the state level and by the federal courts of appeals.¹⁰⁷ Generally, rights to access judicial processes are differentiated based on whether access is sought to a proceeding, trial or hearing before a judge, or to judicial records, the various papers and other forms of information generated and collected through court procedures. Controversies concerning information are divided between the rights to access the information and the rights to use or disseminate the information.

Most of the access controversies to come before the courts have involved criminal matters. In criminal cases, depending upon the type of proceeding, access and use are afforded and protected through the First Amendment and the common law.¹⁰⁸ In bankruptcy cases, access and use are afforded and pro-

106. One author notes that this could result in the prosecution of innocent users. See Haeji Hong, *Hacking Through the Computer Fraud and Abuse Act*, 31 U.C. DAVIS L. REV. 283 (1997).

107. See Louis F. Hubener, *Rights of Privacy in Open Courts—Do They Exist?*, 2 EMERGING ISSUES ST. CONST. L. 189, 191-93 (1989); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 427 n.7, 432-40 (1991). Also, the Freedom of Information Act does not apply to the judicial branch. See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983).

108. For recitation of the history of common law rights regarding access to judicial proceedings and records, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565-74 (1980); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 387-91 (1979); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 n. 8 (1978).

tected through statute, rules of procedure and the common law. As regards civil cases, access rights have been mainly found to depend upon the common law.

If the level of controversy on a subject reflects the level of public interest, few people were interested in accessing the great majority of court records and proceedings until the 1970s. At that time, jurisprudence concerning access to court information increased by orders of magnitude over the previous 100 years. Until the middle 1970s, there were very few published opinions as regards access to court records and proceedings and just as few references to such access in statutes and rules.¹⁰⁹ Government misuses of secret information, concomitant with the technical explosion in the ability to record and reference information, apparently caused an explosion in the desire, and time available, to seek out information such as that residing in the courts.¹¹⁰ At the same time, the courts changed their civil rules of procedure allowing more discovery and exchange of information between the parties in a case, thus creating more information which parties would seek access to.¹¹¹ Procedures, rules and processes which the courts had evolved over the years for filing and accessing information came under attack in the quest for ever more information.¹¹² During this time, the Supreme Court heard an astounding nine cases involving access to court records or pro-

109. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *In re Oliver*, 333 U.S. 267 (1948); *Craig v. Harney*, 331 U.S. 367 (1947); *In re Mosher*, 248 F.2d 956 (C.C.P.A. 1957); *In re Sackett*, 136 F.2d 248 (C.C.P.A. 1943); *In re Drawbaugh*, 2 App. D.C. 404 (1894); *Brewer v. Watson*, 71 Ala. 299 (1892); *Colescott v. King*, 57 N.E. 535 (Ind. 1900); *Sanford v. Boston Herald-Traveler Corp.*, 61 N.E.2d 5 (Mass. 1945); *Cowley v. Pulsifer*, 137 Mass. 392 (1894); *Nowack v. Fuller*, 219 N.W. 749 (Mich. 1928); *Schmedding v. May*, 48 N.W. 201 (Mich. 1891); *Park v. Detroit Free Press*, 40 N.W. 731 (Mich. 1888); *State v. Schmit*, 139 N.W.2d 800 (Minn. 1966); *Flexmir, Inc. v. Herman*, 40 A.2d 799 (N.J. Ch. 1945); *Munser v. Blaisdell*, 48 N.Y.S.2d 355 (1944); *Allen v. Lackey*, 188 P.2d 215 (Okla. 1947); *In re Caswell*, 29 A. 259 (R.I. 1893); *Youmans v. Owens*, 137 N.W.2d 470 (Wis. 1965); *King v. King*, 168 P. 740 (Wyo. 1917).

110. See Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237 (1995).

111. See Miller, *supra* note 108, at 447-63.

112. See *id.* The attack on state statutes is especially noteworthy. For long-standing development of procedures and test of release or sealing of information, see *id.* (detailing the evolution of the discovery process to provide more equal access to justice and an increase in efficiency in case management with procedures to protect privacy). Included in these rules are recent changes mandating disclosure of certain information in civil cases for the reasons of expense and delay reductions, similarly to the requirements currently in bankruptcy cases. See Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991).

ceedings.¹¹³ While the number of cases heard on this single area is large, the specific issues spoken to were fairly narrow, concerning almost exclusively criminal matters.

We will present the current law on availability of court records derived from these cases as applied to criminal matters and the derivation from the law regarding criminal cases by the lower courts of availability of information in civil matters. Then, we will discuss the current availability in bankruptcy matters. The history of access to the first two areas is of much longer standing and provides an interesting context for understanding current access levels to bankruptcy information.

A. *Criminal Prosecutions*

Outside of discovery, grand jury proceedings, plea negotiations, jury deliberations and presentence investigative matters a public right of access to all aspects of criminal prosecutions has been found. The right to access criminal case proceedings and to disseminate information from those proceedings is afforded expansive and strong protection from the First Amendment. The right of access to judicial records in criminal cases, including exhibits admitted at trial, and to disseminate information from the records, is generally afforded less protection at the common law.

Information gathered in criminal cases takes myriad forms, including physical samples, furniture, documents, recordings as well as formalized documents such as warrants, indictments, information, motions, responses, orders and judgments. The evidentiary discovery materials are not in the physical possession of the court until admitted at trial. The nature of most of the evidence and content of documents is extremely private, revealing family relationships, sexual information, medical information and financial information.

The proceedings held in criminal cases are numerous. Starting with the meetings of the grand jury, these include hearings on issuance of warrants, probable cause to try, evidentiary suppression hearings, juror voir dire, motions in limine and sentenc-

113. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers*, 448 U.S. at 555; *Gannett Co.*, 443 U.S. 368; *Warner Communications*, 435 U.S. at 589; *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

ing related hearings. A record of any proceedings held before a judge or magistrate is required.¹¹⁴

The law of access to criminal case information developed most rapidly with the trial. The seminal case regarding access to criminal trials, *Richmond Newspapers*, found both a common law and First Amendment right that criminal trials be open and accessible to the public.¹¹⁵ Further refinement of the expression of this right by the Supreme Court in the *Globe Newspaper* case specified that only a most stringent, strict scrutiny test would overcome the First Amendment right.¹¹⁶ These discussions were extended in the *Press Enterprise* cases to include open access to the voir dire of jurors in criminal cases and open access to probable cause preliminary hearings in criminal cases.¹¹⁷

The reasoning given for access to criminal proceedings rests upon two bases. These bases are set forth in the opinion and various concurrences in *Richmond Newspapers*. The reasoning of the divided court in *Richmond Newspapers* has been restated in subsequent opinions by the Court and has been much analyzed by commentators. In the plurality opinion and several concurrences, the justices found that criminal trials had historically been an open institution in American government.¹¹⁸ As a second basis for finding a First Amendment right to open criminal trials, the justices found, particularly Justice Brennan in his concurrence in judgment, an unstated but structurally necessary component of the Constitution to informed suffrage and participation in government. The justices found a First Amendment right to access government information and processes to the extent necessary to both evaluate government operations, a type of informed suffrage, and to contribute to the process or operation itself, where public access brings independent contributions to the operation.¹¹⁹ The Court found the elements of historical practice, informed suffrage and an independent contribution to the criminal trial from the presence of the public in the courtroom to be present in its determination that the right of access

114. See 28 U.S.C. § 753(b) (1994).

115. See *Richmond Newspapers*, 448 U.S. at 555.

116. See *Globe Newspaper Co.*, 457 U.S. at 607-08.

117. See *Press-Enterprise I*, 464 U.S. at 501; *Press-Enterprise II*, 478 U.S. at 1.

118. See *Richmond Newspapers*, 448 U.S. at 567-73.

119. See *id.* at 575-80 (speaking to effects of publicity on witnesses and prosecutors as well as analogies to system of checks and balances); *Gannett Co., Inc., v. DePasquale*, 443 U.S. 421 (Blackmun, J., concurring and dissenting) ("It is not surprising, therefore, that both Hale and Blackstone, in identifying the function of publicity at common law, discussed the open-trial requirement not in terms of individual liberties but in terms of the effectiveness of the trial process."); Cerrutti, *supra* note 110.

extended to criminal trials as civic exercises or government operations.¹²⁰

These aspects of the First Amendment right were further clarified in *Globe Newspaper*.¹²¹ After refining the right, the Court found, in the context of a mandatory closure statute, that the denial of access to a criminal trial must be necessitated by a compelling governmental interest and narrowly tailored to serve that interest.¹²² The findings in this opinion, as well as those following, seem to point to the validity of a case by case determination of the necessity of closure for privacy, fair trial or other constitutional grounds.¹²³ Lower courts, using mostly the second portion of the analyses of *Richmond* and the strict scrutiny of *Globe* have extended the First Amendment right to access criminal trials to other aspects of criminal cases.¹²⁴

The right to disseminate information heard or seen at a criminal trial appears clear. The Supreme Court has consistently found a First Amendment right to disseminate even sensitive information if it was disclosed at a criminal trial or other criminal proceeding.¹²⁵ The right to have physical access to exhibits or copies of exhibits admitted at criminal trials or proceedings is less clear.¹²⁶ The Court in *Nixon*, found that any right to access exhibits and other judicial records is found, if present at all, under the common law and no First Amendment right to access this type of information exists.¹²⁷

120. See *Richmond Newspapers*, 448 U.S. at 594-96 (Brennan, J., concurring) (finding action of judge at trial to be a form of lawmaking).

121. See *Globe Newspaper Co.*, 457 U.S. at 604-06.

122. See *id.* at 607-08.

123. See *id.* at 608 ("Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.")

124. See *id.*

125. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Oklahoma Publ'g Co. v. U.S. Dist. Court*, 430 U.S. 308 (1977); *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492, 496 (1975); *Sheppard v. Maxwell*, 384 U.S. 333 (1965); *Estes v. Texas*, 381 U.S. 523 (1965); *Craig v. Harney*, 331 U.S. 367, 374 (1947).

126. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *United States v. Kaczynski*, 154 F.3d 930 (9th Cir. 1998); *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996); *In re CBS, Inc.*, 828 F.2d 958 (2d Cir. 1987); *United States v. Guzzino*, 766 F.2d 302 (7th Cir. 1985); *Belo Broad. Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981); *In re National Broad. Co.*, 653 F.2d 609 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *In re National Broad. Co.*, 635 F.2d 945 (2d Cir. 1980);

127. See *Nixon*, 435 U.S. at 608-09. See also *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 120 S.Ct. 483 (1999). For a civil case holding no First Amendment right to access government records, see *Calder v. Internal Revenue Serv.*, 890 F.2d 781, 783-84 (5th Cir. 1989) (citing *Houchins v. KQED*,

Rights to access court records in criminal matters are about as clear as that to access exhibits at trial. The Supreme Court has not visited this specific area. The various courts of appeal are very divided over the source of rights to access judicial records in criminal cases. Some circuits find a First Amendment right to access criminal records and others find only a common law right.¹²⁸

Of all judicial proceedings, criminal cases are truly unique. While the defendant is a private citizen, the public is always the prosecutor. Violation of the criminal law affects the continuance of society and thus places the public as a victim/party in the suit with their champion, the prosecutor. Indeed, criminal matters are so important to the function of our society and government that they may only be brought by a government entity, through its agent. The case also may only be heard by a judge, a government functionary. Where in a civil matter, the parties may negotiate among themselves or use outside private parties to mediate or arbitrate their dispute, no private party may bring or hear a criminal case. Indeed, vigilante justice against supposed criminals is itself a crime.

B. *Civil Suits*

The extent and protection of rights in information from civil matters is more ill-defined than that for criminal matters. Most of the precedent in this area comes from the courts of appeal as only one issue regarding access and dissemination rights in civil matters has reached the Supreme Court. The rationale of the courts varies widely. Notwithstanding these differences, rights to access civil case proceedings and records, and

Inc., 438 U.S. 1, 14 (1978)) ("There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."). See also *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986).

128. See *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *In re Search Warrant for Secretarial Area*, 855 F.2d 569 (8th Cir. 1988); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985); *United States v. Santarelli*, 729 F.2d 1388 (11th Cir. 1984); *Associated Press, Inc. v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983); *United States v. Burka*, 289 A.2d 376 (D.C. Ct. App. 1972).

to disseminate information accessed, appear to be based upon the common law, except in the Third Circuit.¹²⁹

The physical information and proceedings to which the public seeks access, and the parties' privacy, include information gathered by the parties, some of which is brought to the court and some not, and information generated by the court. The information brought before the court is determined by rules of procedure promulgated by the judiciary and local judges. These rules are organized along three broad areas: pretrial documents and proceedings, trial procedures and documents and post-trial documents and proceedings.

Pretrial rules allow the parties to gather a great deal of information. The general types of materials and records generated through these rules and statutes primarily consist of what are known as discovery materials. Discovery materials include copies of original documents of the litigants, written answers to questions and stipulations of fact, as well as transcripts of depositions, face to face question sessions. The more formalized documents which may be filed at this stage also include motions, applications, responses, answers, the complaint and answer, objections, notices and orders. Federal civil rules detail the format, and to some extent the content, of the complaint and any answer or responsive motion.¹³⁰ The rules require the names of the litigants be revealed by placing them on the complaint and subsequent pleadings.¹³¹

The majority of hearings held at this stage concern disputes over exchange of discovery information. Many hearings are also held concerning various motions to proceed without a trial, such as motions to dismiss and for summary judgment.

At the trial, information gathering has stopped and the presentation of relevant and admissible portions of that information takes place. The results of all that has transpired through pre-trial proceedings are presented to the judge and jury. Transcripts and recordings along with any physical evidence are gathered as the records of the trial.

Post-trial information gathered includes motions, responses, objections, notices and orders along with appellate briefs. The types, format and some content of subsequent documents

129. See *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984).

130. See FED. R. CIV. P. 3 & 5.

131. See FED. R. CIV. P. 10(a) & 7(b)(2).

through post-trial actions are also set forth.¹³² The format of these documents is dictated by rules of procedure.

In addition to mandating the type and format of information presented to the court, requirements for court generated records are also set forth in rules of procedure. A docket and the chronologic index of all documents and hearings, must be kept.¹³³ A separate chronologic index of judgments must be kept by the court.¹³⁴ Orders, notices and judgments generated by the court must also be filed and conform with format requirements in the rules of procedure. Physical evidence presented at trial must be kept with the court, usually for a limited time.¹³⁵

Almost all of the information gathered during these three stages is filed with the court or presented at the trial. Settlement negotiations and related materials, juror names and deliberation transcripts or materials, and judges' notes are the few areas where filings of transcripts and materials are not required.¹³⁶ Finally, transcripts or electronic recordings must be kept of every hearing or trial.¹³⁷

The law of access to this information is not as clear as most would like it to be. While a rule of procedure affords the public access to trials on the merits before a judge, no bright line tests of access rights to other proceedings and information have evolved and decisions rest on required case by case application of judicial case management rules.¹³⁸

The analysis used by the majority of courts in civil cases to determine access rights to either judicial records or proceedings hinges on the limited findings and language of the Supreme Court in two cases, *Nixon v. Warner Communications* and *Seattle Times v. Rhinehart*, both of which specifically involve judicial records.¹³⁹ A small minority of courts use the reasoning found in *Richmond Newspapers, Inc. v. Virginia* in analyzing civil case access, relying on dicta found in a footnote in that case.¹⁴⁰

132. See FED. R. CIV. P. 5 & 10. See Fed. R. App. P. 27-32.

133. See FED. R. CIV. P. 79.

134. See FED. R. CIV. P. 58 & 79.

135. See FED. R. CIV. P. 83.

136. See *United States v. Gurney*, 558 F.2d 1202, 1210-1211 (5th Cir. 1977). However, settlement agreements and orders in class actions must be filed pursuant to FED. R. CIV. P. 26(e). See Miller, *supra* note 107, at 427.

137. 28 U.S.C. § 753(b).

138. See FED. R. CIV. P. 77(b).

139. See *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

140. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("Whether the public has a right to attend trials of civil cases is a ques-

Although provided the opportunity, the Supreme Court has not found any First Amendment right of public access in civil cases. Instead, the court found in *Nixon* that no First Amendment public right to copy exhibits in civil trials exists.¹⁴¹ In *Seattle Times*, the Court found no First Amendment right of litigants to access or disseminate information accessed solely through court rules to try a civil case. This reluctance on the part of the Court to extend First Amendment rights of access to civil cases appears to have acted as a negative precedent upon lower courts, as only an extremely small minority have extended any form of constitutional level access rights to civil cases.

The lower courts have made limited findings as regards rights of access to civil case proceedings. Two circuit courts of appeals have found a right of the public to access civil trials under the First Amendment.¹⁴² Two other circuit courts of appeal have found a First Amendment right of public access limited solely to certain proceedings, civil trials regarding prisoners and contempt hearings.¹⁴³ Finally, to complicate the picture further, three circuit courts reaching the issue of public access to civil trials have found such a right to exist under the common law.¹⁴⁴

The lower courts have, however, unanimously found a common law public right to access some aspects of civil case information,¹⁴⁵ following an acknowledgment in *Nixon* that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."¹⁴⁶ The courts have established boundaries to that right based upon judicial supervisory powers and interests, again quoting from *Nixon*:

tion not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

141. See *Nixon*, 435 U.S. at 608-09.

142. See *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir.1985) (applying First Amendment level test as regards access to civil trial and sealing of trial records.); *Westmoreland v. C.B.S., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).

143. See *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984) (contempt hearings); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (civil trials regarding prisoners).

144. See *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371 (8th Cir. 1990); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1177-79 (6th Cir. 1983); *Woven Elec. Corp. v. Advance Group, Inc.*, 930 F.2d 913 (4th Cir 1991) 1991 WL 54118 (unpublished disposition).

145. See, e.g., *Webster Groves*, 898 F.2d at 1376-77; *Wilson*, 759 F.2d at 1568; *Brown & Williamson*, 710 F.2d at 1177-80; *Wilk v. American Med. Ass'n*, 635 F.2d 1295 (7th Cir. 1980).

146. *Nixon*, 435 U.S. at 598 (footnotes omitted).

It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.¹⁴⁷

Applications of these boundaries are made in individual cases through the trial judge, as "[t]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."¹⁴⁸

The findings of the majority of circuit courts also include elements of the analysis found in *Seattle Times*, where the Supreme Court dealt with the rights of litigants in a civil case to access and disseminate discovery records. The opinion did not specifically reach to other types of judicial records generated in civil cases, to any pretrial proceedings or the civil trial itself, or to any rights of the public to access records in civil cases.¹⁴⁹ Following the criteria set out in *Richmond Newspapers Inc. v. Virginia*,¹⁵⁰ the Court found first that no long standing practice of open public access to discovery practices and filed materials exists.¹⁵¹ The Court also found that the only source of access rights to the information is through court discovery processes, "a matter of legislative grace."¹⁵² Finally, the Court found that public access rights offer a significant potential for abuse.¹⁵³ Based on this analysis, the Court held that no First Amendment or common

147. *Id.* at 598 (quoting *In re Caswell*, 18 A. 259, 293 (R.I. 1893)).

148. *Id.* at 599 (footnotes omitted).

149. *See Seattle Times v. Rhinehart*, 467 U.S. 20 (1984).

150. 448 U.S. 555 (1980).

151. *See Seattle Times*, 467 U.S. at 33-35. An exception to this practice is specifically set forth in the Publicity in Taking Evidence Act of 1913, 15 U.S.C. § 30 (1997) (depositions in cases brought by the government under the Sherman Act are open to the public).

152. *Seattle Times*, 467 U.S. at 32.

153. *See id.* at 33-35 (finding of potential for abuse in public access and dissemination of discovery information is contrary to the finding of a structural contribution by public access to criminal trials).

law right of litigants exists to access or disseminate information acquired solely due to court rules of procedure.¹⁵⁴

In addition to the findings and analysis discussed above, courts and commentators have looked to the purposes of gathering information in civil cases, and the reasons for bringing it to the court, in analyzing access issues. Again, *Nixon* and *Seattle Times* are often cited.¹⁵⁵ Although not couched in these terms, the courts generally find that the public and litigants cannot piggyback on the discovery process to gain access rights they would not have otherwise. Citing to the results in *Nixon*, the courts then reason that just because the courts act as custodian of information does not mean the public has a First Amendment right to that information.

This line of analysis finds that the function of the judicial system, to which access is sought, is not to gather information for public consumption, but for "the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."¹⁵⁶ These courts find that just because there is a public interest, "[i]t does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery,"¹⁵⁷ and the Supreme Court, "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."¹⁵⁸

With these bases in mind, the law of access to judicial records in civil cases has evolved in an equally fragmented manner. Only a very small minority of courts has found a right of public access under the First Amendment.¹⁵⁹ As discussed previously, lower federal courts have, however, unanimously found a right of public access under the common law.¹⁶⁰ Whether finding a First Amendment or common law right, the majority of

154. See *id.* at 32.

155. See *id.* at 20; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

156. *Seattle Times*, 467 U.S. at 34; See also *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("[d]iscovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public"); A. Miller, *supra* note 107, at 441. ("Nor does the mere use of governmental processes to gather information generally create a First Amendment right of public access to the information collected.")

157. *Seattle Times*, 467 U.S. at 31.

158. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978).

159. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *Enprotech Corp. v. Randa*, 983 F.2d 17 (3d Cir. 1993); *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Littlejohn v. Bic Corp.*, 851 F.2d 673 (3d Cir. 1988); *Rushford v. New Yorker Magazine*, 846 F.2d 249 (4th Cir. 1988); *Bank of Am. Nat'l Trust v. Hotel Rittenhouse*, 800 F.2d 339 (3d Cir. 1986).

160. See *supra* note 144.

courts have limited the definition of judicial records, and thus the scope of any right, to a subset of the records actually in the court's possession. Distinctions used to define the subsets have been drawn based on the dispositive relationship of the records to substantive rights and to the temporal relationship of the records to any judgment.

So what is a judicial record? Is it all records in the physical possession of the court or some limited type of those records? Is it all records in possession of the court after judgment has been rendered, no matter the type?¹⁶¹

The lower federal courts appear to have answered these questions by looking to the relevancy and use of the materials, judicial records, in coming to a dispositive ruling and by defining which operations of the court in private disputes are governmental and which materials necessary to evaluate the judicial system. The facts and issues analyzed illustrate a balancing of privacy concerns of litigants with the public right to evaluate government operations.¹⁶²

One circuit has set a bright line test, and in so doing, the court has found that all materials are relevant to public review of the judicial system. In the Third Circuit, all materials in the physical possession of the court are defined as judicial records and the public enjoys a First Amendment right of access to all judicial records unless the materials are properly held under seal.¹⁶³

The vast majority of the other eleven circuits have been much more circumspect regarding the definition of judicial records. These courts define judicial records, not as all materials held by the court, but only those materials referenced by a judge or jury in making various rulings.¹⁶⁴ These courts find "[t]hat

161. See *San Jose Mercury News, Inc. v. United States District Court*, 187 F.3d 1096 (9th Cir. 1999); *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997); *In re Reporters Comm. for the Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *In re Coordinated Pretrial Proceedings*, 101 F.R.D. 34, 43 (C.D. Cal. 1984).

162. See *El-Sayegh*, 131 F.3d at 161-163; *Joy v. North*, 692 F.2d at 893 (2d Cir. 1982) ("[a]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny"); *Wilk v. American Med. Ass'n.*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980).

163. See *Borough of Stroudsburg*, 23 F.3d 772 at 782; *Enprotech Corp.*, 983 F.2d 17, 20-21; *Littlejohn*, 851 F.2d 673; *Bank of Am. Nat'l Trust*, 800 F.2d at 344-45; but see *Republic of Phillippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (basing finding of access to summary judgment materials on common law right and dispositive nature of materials).

164. See *El-Sayegh*, 131 F.3d at 163; *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *EEOC v. Erection Co., Inc.*, 900 F.2d 168 (9th Cir. 1990); *Rushford v. New Yorker Magazine*, 846 F.2d 249 (4th Cir. 1988); *Anderson v. Cryovac*, 805 F.2d 1, 13 (1st Cir. 1986); *In re Continental Ill. Sec. Litig.*, 732 F.2d

what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process."¹⁶⁵

Moreover, "[d]ocuments that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken"¹⁶⁶ are not relevant for evaluation of the judicial system and thus not subject to public access. These courts follow the reasoning of Justice Holmes:

The chief advantage to the country which we can discern [from application of the public records privilege to judicial records] . . . is the security which publicity gives to the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed. . . . [I]t is clear that [these grounds] have no application whatever to the contents of a preliminary written statement of a claim or charge. These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court.¹⁶⁷

Even after information is classified as a judicial record, and thus subject to some level of a public right of access, access may be limited through protective orders, sealing or redacting information, made upon a showing of good cause or an overriding interest. Limiting access through a finding of good cause generally involves trade secrets, confidential business information or improper use.¹⁶⁸ Compelling, overriding interests have been found to include privacy,¹⁶⁹ a fair trial,¹⁷⁰ "safeguarding the phys-

1302, 1308-10 (7th Cir. 1984); *Oklahoma Hosp. Ass'n v. Oklahoma Publ'g Co.*, 748 F.2d 1421 (10th Cir. 1984); *Joy*, 692 F.2d at 880.

165. *El-Sayegh*, 131 F.3d at 163.

166. *Id.* at 162 (citing *Washington Legal Found. v. United States Sentencing Com'n*, 89 F.3d 897, 905 (D.C. Cir. 1996)).

167. *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

168. *See* FED. R. CIV. P. 26 (c)(7).

169. *See In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470 (6th Cir. 1983); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983).

170. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

ical and psychological well-being of a minor,"¹⁷¹ and protection of juveniles,¹⁷² and national security. Most of the findings are very fact driven. Much has been written about the use and misuse of these tools of judicial case management and a complete discussion of the jurisprudence of these tools is beyond the scope of this article.¹⁷³

As can be seen, the basis for access to criminal versus civil proceedings and records lie in the government nature of the case.¹⁷⁴ Criminal cases are essential government functions with the public involved in three ways: as a secondary victim; through its agent, the prosecutor; and its agent, the judge. Civil cases have fewer public/governmental components. They generally do not involve the government, thus the public, as a party. The functionaries subject to public scrutiny in a civil case are essentially the judges. Because of this low level of government presence in a civil trial, the courts concentrate scrutiny on the judge as the primary focus of the right of public access and have limited access to those proceedings where a judge is present making substantive findings, and to those materials which show how the judge is administering a case and upon which the judge relies to make those substantive findings.

C. *Proceedings in Bankruptcy*

The extent of rights in information concerning bankruptcy courts is found in statutes and rules of procedure. There is little case law and most courts have not had to rule on First Amendment or common law access rights issues.

171. *Id.* at 607 n.19.

172. See 18 U.S.C. § 5038(a), (c) & (e) (1994).

173. See Fitzgerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL'Y 381 (1990); Lloyd et al., *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991); Miller, *supra* note 107.

174. "Arguably, the public interest in securing the integrity of the fact finding process is greater in the criminal context than the civil context, since the condemnation of the state is involved in the former, but not the latter." *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983).

For the purpose of civil litigation, courts exist chiefly as a public service to persons who cannot work out their private disputes and need the intervention of an unbiased entity to help bring the controversy to an end. Briefly stated, the public interest in civil litigation is mainly that these private disputes be concluded peacefully, fairly and without too much cost to society as a whole.

Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1017 (11th Cir. 1992) (Edmondson, J., dissenting).

The information and proceedings before a bankruptcy court to which the public seeks access are divided into three main areas, pursuant to various statutes and rules.¹⁷⁵ These areas are distinguished by the level of judicial involvement, the presence of adverse parties and the need for actual litigation process. The first of these areas, "a case under title 11," for our purposes the "main bankruptcy case," consists primarily of uncontested applications and administrative procedures unique to the bankruptcy code, which mostly proceed by operation of law.¹⁷⁶ The second

175. See 28 U.S.C. § 1334 (1994) (distinguishes four types of matters in bankruptcy and grants original jurisdiction to the district court over these matters):

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The district court is allowed to refer any part, or all, of this grant of jurisdiction to bankruptcy judges, pursuant to 28 U.S.C. § 157(a) (1994), with reservation or limitations to jurisdiction further refined by exceptions to several types of civil suits, pursuant to 28 U.S.C. § 157(b) & (c) (1994):

(b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a case under title 11 but is otherwise related to a case under title 11.

176. See 11 U.S.C. §§ 301-303, 501-503 & 521 (1994). "Section 1334 lists four types of matters over which the district court has jurisdiction: (1) 'cases under title 11,' (2) 'proceedings arising under title 11,' (3) proceedings 'arising in' a case under title 11, and (4) proceedings 'related to a case under title 11.' The first category refers merely to the bankruptcy petition itself, filed pursuant to 11 U.S.C. §§ 301, 302 or 303." *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987). See also *In re Wolverine Radio Co.*, 930 F.2d 1132, 1141 (6th Cir. 1991). According to the 1983 Advisory Committee Notes of the Federal Rules of Bankruptcy Procedure, applications are requests for relief requiring judicial consideration but not involving adverse parties; applications include requests for: permission to pay filing fee in installments (Rule 1006(b)(1)), appointment of a creditor's committee (Rule 2007(a)), employment of a professional person (Rule 2014(a)), entry of final decree (Rule 2015(a)(6)), compensation for services rendered (Rule 2016(a)), notice as to criminal contempt (Rule 9020(a)(2)), removal (Rule 9027(a)), and shortening periods of notice (Rule 9006(d)). See FED. R. BANKR. P. 9013 (advisory committee notes).

This portion of a case under title 11, opening bankruptcy papers, applications and voluntarily filed forms, has been found to consist of a legal remedy which does not rise to a suit in law. Courts reason that this part of the proceedings is not a suit because no damages are sought, there is no opposing party

area consists of proceedings arising under title 11 called "contested matters" which are not civil suits, as that term has been defined by the courts, but involve adverse parties and the consideration of a judge.¹⁷⁷ The third area consists of "adversary proceedings" which are civil suits involving some area of bankruptcy, or nonbankruptcy, law.¹⁷⁸ The proceedings and materials held by the court in each area and, arguably, the levels of public access afforded to them, differ.

The information generated in the main bankruptcy case and contested matters includes documents required of the debtor, motions and claims filed by creditors, applications, orders releasing liens and abandoning some property, as well as court generated administrative notices and court generated orders discharging the debtor and closing the case. The content and types of documents generated are mandated by statutes and rules.¹⁷⁹ Official forms are provided for most of these documents.¹⁸⁰

It is the main bankruptcy case which generates the information most at issue in this article. As discussed previously, the content of the forms filed in a bankruptcy case includes extensive, private, financial and demographic information concerning debtors. Information in a main bankruptcy case concerning

against whom redress is sought, and compulsory process is not issued. See *In re Barrett Ref. Corp.*, 221 B.R. 795 (Bankr. W.D. Okla. 1998); *In re Psychiatric Hosps. of Fla., Inc.*, 216 B.R. 660 (Bankr. M.D. Fla. 1998); *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998).

177. See FED. R. BANKR. P. 9014, 1018. See also *In re Wolverine*, 930 F.2d at 1144 (citing *In re Wood*, 825 F.2d at 96-97).

178. See FED. R. BANKR. P. 7001 (listing ten such proceedings). According to the 1983 Advisory Committee Notes, adversary proceedings are actual disputes involving adverse parties which involve litigation requiring process as in any civil suit. They include some disputes arising under title 11 and some disputes arising under nonbankruptcy law which are related to a case under title 11.

Courts find adversary proceedings to be civil suits. See, e.g., *In re Mitchell*, 222 B.R. 877 (9th Cir. 1998); *In re Doiel*, 228 B.R. 439 (Bankr. D. S.D. 1998); *In re Mueller*, 211 B.R. 737, 741 (Bankr. D. Mont. 1997); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140 (4th Cir. 1997).

179. See 11 U.S.C. § 301 (1994) (regarding the petition to be filed); 11 U.S.C. § 501 (1994) (listing of creditors and schedule of assets and liabilities, schedule of current income and expenditures and a statement of financial affairs); 11 U.S.C. § 521 (1994) (statement of intentions with respect to retention and surrender of secured property); 11 U.S.C. § 522(l) (1994) (list of property claimed exempt from the estate); 11 U.S.C. §§ 1106 & 1107 (1994) (reports on assets and operations); 11 U.S.C. §§ 1121, 1221 & 1321 (1994) (filing a plan); FED. R. BANKR. P. 1002-1004; FED. R. BANKR. P. 1005; FED. R. BANKR. P. 1007; FED. R. BANKR. P. 4002.

180. FED. R. BANKR. P. 9009 (requires use of official forms which are allowed pursuant to 28 U.S.C. § 2075).

creditors includes creditor name and address, and the nature and amount of the debt owed.

There is little historical information concerning the basis for inclusion of the various types of information required of the debtor in bankruptcy documents. Most of the information required is relevant to identification of debtors, location of assets and determination of debtors' financial condition. Courts have found the need for the information disclosed to aid creditors in identifying the debt owed and determining debtors' ability to pay, to identify estate assets and to identify possible bankruptcy fraud.¹⁸¹

The provision of social security numbers on the petition is of some controversy. Several courts have recited protection of creditors as the primary reason for requiring the numbers.¹⁸² These courts find that social security numbers are necessary to protect creditor due process rights by helping the creditor identify the debtor, thus allowing them to identify the debt owed and file any necessary proofs of claim or take other actions, and by helping creditors and other entities in the bankruptcy system to identify serial filers, locate unlisted assets or find other instances of bankruptcy fraud.¹⁸³

Adversary proceedings generate the same type of records as in any civil suit. Some of these records are composed of discovery materials as discussed previously for a civil suit.

181. See *In re Laws*, 223 B.R. 714 (Bankr. D. Neb. 1998) (debtor sought to use alternate address; court found could only seal address when debtor is threatened by assault).

182. See *In re Adair*, 212 B.R. 171 (Bankr. N.D. Ga. 1997); *In re Anderson*, 159 B.R. 830 (Bankr. N.D. Ill. 1993); *In re Austin*, 46 B.R. 358 (Bankr. E.D. Wis. 1985).

183. Notwithstanding this reasoning, the Bankruptcy Code provides that the name, address and social security number/tax identification number of debtor if omitted from the Notice of Commencement of Case and First Meeting of Creditors does not invalidate the legal effect of that notice. See 11 U.S.C. § 342 (1994). See also 140 CONG. REC. H10752-01, H10759 (1994):

This section amends section 342 of the Bankruptcy Code to require that notices to creditors set forth the debtor's name, address, and taxpayer identification (or social security) number. The failure of a notice to contain such information will not invalidate its legal effect, for example, such failure could not result in a debtor failing to obtain a discharge with respect to a particular creditor.

The Committee anticipates that the Official Bankruptcy Forms will be amended to provide that the information required by this section will become a part of the caption on every notice given in a bankruptcy case. As with other similar requirements, the court retains the authority to waive this requirement in compelling circumstances, such as those of a domestic violence victim who must conceal her residence for her own safety.

Most of the information generated in a bankruptcy case or adversary proceedings is required to be filed with the court.¹⁸⁴ The court is required to keep a docket composed of chronologic entries of activity, orders and judgments.¹⁸⁵ A separate docket of creditor claims, the claims register, is also required of the court.¹⁸⁶ Copies of judgments and orders are also kept.¹⁸⁷ Finally, if a transcript or recording of a proceeding before a bankruptcy judge is made, it must be filed as well.¹⁸⁸

The need for a place to file the information required for the various parts of a bankruptcy case, and a place for parties and the public to review the information, is self-evident. The reasoning for placing the courts as the repository for all information, except tapes of the meeting of creditors, appears to be based on happenstance, rather than on use of the information by the court. There was no other entity at the time the bankruptcy code was enacted to give the duty to.¹⁸⁹ The U.S. Trustee's Office was too new and experimental. No one knew if it would succeed, and it had no office space to store documents or space to offer public access to review the documents.

Proceedings before a bankruptcy judge in a main bankruptcy case are rare. The debtor is required to appear at least once at a meeting of creditors; however, this meeting is a mandated deposition and not a proceeding as courts have used that term in civil or criminal cases.¹⁹⁰ This meeting is presided over

184. See *supra* note 182.

185. FED. R. BANKR. P. 5003(a).

186. See *id.* 5003(b).

187. See *id.* 5003(c).

188. See *id.* 5007.

189. The 1977 Report of the Commission of Bankruptcy Laws recommended that all petitions be filed with the yet to be created Office of the United States Trustee. The House version of the bill did not specify a place to file petitions. See H.R. REP. NO. 595-321 (1977). The Senate version specified filing petitions with the bankruptcy judge. The current provisions at 11 U.S.C. §§ 301-303 appear a practical compromise. See S. REP. NO. 989-31 (1978). In addition, the House and Senate reports indicate that, other than the opening documents related to the petition, all other post-petition documents were to be filed with the court.

190. See 11 U.S.C. §§ 341-43 (1994). 11 U.S.C. § 341 (c) states that "[t]he court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors." Some of the reasoning behind this procedure is found in the House Report:

In keeping with the thrust of the bill to remove the bankruptcy judge from administrative matters and not to involve him in situations where he will hear evidence outside of the context of a dispute that he must decide, the bankruptcy judge will not be the presiding officer at the meeting, and will not be authorized to question the debtor as he is today. If there were to be any disputes resolved there, the judge might

by an employee of the Office of the United States Trustee, part of the Department of Justice, or a case trustee, who is appointed by a United States Trustee. The trustee and creditors depose the debtor and a recording, which is kept at the local office of the U.S. Trustee, is made of the meeting.¹⁹¹ Subsequent depositions and requests for documents of debtors, and some entities, are also allowed and procedures for compelling attendance and production are provided.¹⁹² Involvement of a bankruptcy judge in these depositions is extremely rare.

If a dispute of a cause under the bankruptcy code, a contested matter, does arise, pleadings are filed with the court. Some of the discovery information acquired through examinations of the debtor and other entities may be presented to the court as exhibits to a motion. A hearing or trial may actually be held before a bankruptcy judge.

In adversary proceedings, the same type of proceedings are held before a bankruptcy judge, or in some instances a district judge, as in any civil suit.¹⁹³ Most of the rules of procedure used in a civil suit before the district court apply also to an adversary proceeding in bankruptcy court, including especially the pretrial discovery rules.¹⁹⁴ Adversary proceedings receive a court case number separate from the court number given the main bankruptcy case.

be present, but will not be present for the examination of the debtor, as this has caused too many problems of the dispute-decider hearing inadmissible evidence.

H.R. REP. NO. 595-331 (1977).

191. See FED. R. BANKR. P. 2003(c) (Record of Meeting):

Any examination under oath at the meeting of creditors held pursuant to § 341(a) of the Code shall be recorded verbatim by the United States trustee using electronic sound recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the United States trustee shall certify and provide a copy or transcript of such record at the entity's expense.

192. See FED. R. BANKR. P. 2004 (allowing examination of debtor and entities with respect of acts, conduct, property, liabilities and the financial condition of the debtor); FED. R. BANKR. P. 2005 (compelling attendance).

193. Pursuant to 28 U.S.C. § 157(a) (1994), jurisdiction to hear disputes and cases is referred to the bankruptcy judges by an order of district court. This reference may be withdrawn upon motion and order by the district court. See *id.* § 157(d). The referral is withdrawn by operation of law for causes including personal injury torts, wrongful death suits and disputes involving matters of interstate commerce, pursuant to 28 U.S.C. § 157(b)(5) & (d).

194. See FED. R. BANKR. P. 7002-7071.

The history of public access to the various types of processes and proceedings in bankruptcy is not well chronicled. However, the evolution of general bankruptcy principles and practices is, and may shed some light on why a proceeding may or may not need to, or have been, public.

The principles upon which bankruptcy is based have developed along with increases in trade and economic advances. Over the ages, debt has been abhorred and incurring debt has been considered a dishonest act, while becoming bankrupt has been considered a criminal act.¹⁹⁵ This belief in the criminal nature of failure to pay one's debts arose from practices in ancient societies and religious teachings against any form of usury.¹⁹⁶ These laws began to be lifted in the late middle ages; however, bans on money lending were not fully removed by the Catholic Church until 1836 and still exist under Islam.¹⁹⁷ In light of the religious beliefs against usury, secular punishment and treatment of debtors have been harsh and paralleled criminal punishment and prosecution procedures.¹⁹⁸

The influence of this tradition is still present under both English and American laws today. However, beginning in 1898, and expanding in 1978, American bankruptcy law began to break with the old traditions of treating debtors as criminals¹⁹⁹ and two

195. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 8-12 (1995) (quoting Blackstone):

"[T]he law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater."

196. See JAMES D. DAVIDSON & LORD WILLIAM REES-MOGG, *THE GREAT RECKONING* 231-34 (1993) (portraying an interesting exposition on the confluence of religious practices and economics).

197. See Tabb, *supra* note 195, at 12 (quoting Blackstone):

"A bankrupt . . . was formerly considered merely in the light of a criminal But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the debtor or bankruptcy himself."

See also DAVIDSON & REES-MOGG, *supra* note 192.

198. Punishments included imprisonment, death, appearance on demand and others. See Tabb, *supra* note 195, at 7-12.

199. See David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 328 (1999) ("Unlike the almost punitive British system, the 1898 Act was repeatedly defended as protecting the 'honest but unfortunate' debtor."); Tabb, *supra* note 195, at 5.

factions developed.²⁰⁰ The first is composed of those who focus on bankruptcy law as an avenue to punish criminals, who happen to be called debtors.²⁰¹ The second, reformist faction, allows for the existence of fraudulent, criminal debtors, but sees bankruptcy law as an avenue to return the majority of unfortunates, called debtors, to contributing members of society.²⁰²

There is no question that early American principles of bankruptcy law were derived from the English, old tradition system.²⁰³ That system was first codified some 400 years ago, and began with allowance for only discretionary, quasi-criminal examinations of witnesses by the court, solely for the purpose of investigating suspected fraudulent debtors.²⁰⁴ Contrary to the voluminous historical information concerning public access to criminal proceedings under early English law, historical information concerning access to bankruptcy proceedings is conspicuously absent and general historical information does not indicate whether any proceedings were open to the public. Information

200. These two factions still exist and are very active today. See *Responses of Honorable Edith H. Jones to Follow-up Questions of the Senate Judiciary Subcommittee on the National Bankruptcy Review Commission Report*, 52 CONSUMER FIN. L.Q. REP. 169, 171 (1998) (referring to abuses by debtors generally and the decline of the "moral stigma of bankruptcy").

201. See Tabb, *supra* note 195, at 8 ("The premise of debtor misconduct as the basis for involuntary bankruptcy, rather than financial status, remained in place until the Bankruptcy Reform Act of 1978 was enacted.").

202. See Charles Jordan Tabb, *A Century of Regress or Progress?: A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 355-57 (1999) (quoting H. H. Shelton, *Bankruptcy Law, its History and Purpose*, 44 AM. L. REV. 394, 401 (1910) and then the 1890 Report of the House Judiciary Committee):

Countless debtors throughout our country were laboring under the burden of debt, and the debt-laden man has little ambition to accumulate, or to succeed as the world views success. His energies do not play freely, his family suffers, and he is not in position to render either the State or society efficient service. . . .

It is a matter of public concern that every citizen should have an opportunity to pursue the calling for which he is best adapted and in the way and under the circumstances which will enable him to be as large a producer as possible, to the end that the aggregate wealth of the community in which he lives may be increased. When a man has paid his honest debts to the extent of the distribution of his property, it becomes a matter of public concern that he should be released from his indebtedness.

203. As Justice Holmes stated, "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system." Sexton v. Dreyfus, 219 U.S. 339, 344 (1911).

204. 1 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES 3 (2d ed. 1915).

on access to bankruptcy papers and pleadings is nonexistent. In more modern times, a second type of proceeding, a public examination of the debtor by the English court was instituted.²⁰⁵ Under current practice, this examination may be conducted privately.²⁰⁶ The examination, and subsequent investigations under the English system are akin to a combination full financial audit and criminal background check, taking several years to complete.²⁰⁷

As with the English system, historical information as regards access to American bankruptcy proceedings and materials is lacking. In its beginnings, the American system required an examination of the debtor by the court where only creditors and parties in interest could attend.²⁰⁸ The Bankruptcy Act of 1898 altered this process by requiring a meeting of creditors to be held before a judge or referee, with judicial discretion as to any general public access.²⁰⁹ Later amendments required that this meeting before the court be public.²¹⁰

As discussed previously, bankruptcy practice in the last 100 to 150 years, under both English and American laws, has eliminated the presence of the court at the meeting of creditors and any nonadjudicatory examinations of the debtor or entities. In addition, these current laws contain provisions that allow waiver of public examination or provisions that do not expressly require that the meeting of creditors or examinations be held publicly at all.²¹¹

While these discovery type proceedings are not required to be open to the public under current American practice, rights of the general public and creditors to access hearings and trials held before a bankruptcy judge are granted directly by a rule of

205. See *In re Astri Inv. Manag. & Sec. Corp.*, 88 B.R. 730, 737 (D. Md. 1988) (citing several sources concerning English laws of that time).

206. I. F. FLETCHER, *LAW OF BANKRUPTCY* (1978).

207. See Skeel, *supra* note 199, at 171 n.28 and references cited therein.

208. See Bankruptcy Act of 1841, §§ 4 & 7, 5 Stat. 440, 444 & 446 (1841); Bankruptcy Act of 1800, §§ 18 & 52, 2 Stat. 19, 26 & 34 (1800).

209. Bankruptcy Act of 1898, §55, 30 Stat. 544, 559 (1898).

210. Bankruptcy Act of 1938, 52 Stat. 840, 865 (1938). Courts of that time found that any proceeding before a judge or referee must not be held *in camera*. See *In re Astri Inv.*, 88 B.R. at 738-39 and sources therein.

211. For the law of Great Britain, see Insolvency Act of 1976, ch. 60, §6 (1976); FLETCHER, *supra* note 206, at 112-15. For the laws of the United States, see 11 U.S.C. §§ 341-343 (1994); FED. R. BANKR. P. 2003-2004. While no mention or requirement of public examination at the first meeting of creditors is made in the American bankruptcy laws and rules, the recording or transcript of that meeting is required to be made available for public access and copying by the United States trustee, see FED. R. BANKR. P. 2003(c), and a report on the meeting is required to be filed with the court, see FED. R. BANKR. P. 2003(d).

procedure.²¹² This rule applies to both contested matters and any adversary proceedings because it refers to any trial or hearing before a bankruptcy judge and does not distinguish between the various types of proceedings which may be brought before a bankruptcy judge. Arguably, rights of public access to proceedings before a bankruptcy judge are also provided through the common law similarly as has been found by the majority of the courts of appeal to civil proceedings generally.

The issue of public access to bankruptcy proceedings has not drawn enough contention to result in many published opinions.²¹³ However, in this dearth of dispute, courts in one district have gone so far as to find that a bankruptcy case, and every event and proceedings associated with it, rises to the level of a civil suit and, therefore, the public is afforded a First Amendment right of access.²¹⁴ On that basis, they have found a First Amendment right of the public to attend the first meeting of creditors, the administrative proceeding held before an executive agency, the Department of Justice, and depositions in prelitigation discovery.²¹⁵ These courts' rather strained support greatly

212. FED. R. BANKR. P. 5001(b) ("All trials and hearings shall be conducted in open court and so far as convenient in a regular court room.").

213. See *In re* 50-Off Stores, Inc., 213 B.R. 646 (Bankr. W.D. Tex. 1997) (*in camera* hearing on retention of professional allowed).

214. See *In re* Symington, III, 209 B.R. 678, 694 (Bankr. D. Md. 1997) (2004 examination); *In re* Astri Inv., 88 B.R. at 736 (meeting of creditors).

215. Contrary to the majority of courts reviewing the issue directly, both courts find by result that the entity conducting the meeting or examination is an extension of the court. See *In re* Astri Inv., 88 B.R. at 740 ("However, the fact that a United States trustee now presides at creditor's meetings does not change the essentially judicial character of the proceedings."); see also Symington, 209 B.R. at 694 (finding that 2004 examinations include investigation of matters related to the substantive discharge rights of the debtor).

Though trustees and examiners are given broad authority under the Bankruptcy Code, and are judicial officers as that term is used to designate any attorney, the majority of courts find that they are not extensions of the court as they do not adjudicate substantive rights of debtors and creditors. See *In re* Ionosphere Clubs, Inc., 156 B.R. 414 (S.D.N.Y. 1993); *In re* Lazar, 28 Fed. R. Serv. 3d 52 (Bankr. C.D. Cal. 1993); *In re* Apex Oil Co., 101 B.R. 92, 99 (Bankr. E.D. Mo. 1989); *In re* Baldwin United Corp., 46 B.R. 314, 316 (S.D. Ohio 1985); *In re* Hamiel & Sons, Inc., 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982). But see *In re* Continental Airlines, 150 B.R. 334, 342 (D. Del. 1993) (finding fee examiner to be equivalent to a special master).

In addition, the legislative history of the current provisions of the Bankruptcy Code removing judges from presiding at examinations of the debtor also supports the argument that any trustee and examiners are not extensions of the court since they are, by negative implication, not a "dispute-decider":

In keeping with the thrust of the bill to remove the bankruptcy judge from administrative matters and not to involve him in situations where he will hear evidence outside of the context of a dispute that he must

exceeds the public access rights found in any civil context and even exceeds the level of access rights granted the public in the criminal prosecution process. Even in criminal prosecutions, the suspect or convicted criminal is not questioned before the public outside of any appearance as a witness before a judge.

Rights of the public to access all materials held by the court in a main bankruptcy case are granted directly through the bankruptcy code, as "A paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge."²¹⁶ The legislative history behind the rule providing access to hearings and trials and the statute above does not provide any reasoning. Lacking any specific historic reference, one commentator and several courts have commented that the provisions in the bankruptcy code concerning access to information filed with the court codify the common law right of public access to judicial records generally acknowledged in Nixon.²¹⁷

Several courts have stated that the reasoning for extensive public access in bankruptcy is based upon the needs for creditor access and participation in a specific case: "To at least some extent, this statutory directive for open access flows from the nature of the bankruptcy process—which is heavily dependent upon creditor and public participation, and which requires full financial disclosure of the debtor's affairs."²¹⁸ That same court continued, "Thus, bankruptcy cases, by their need for creditor participation and debtor disclosure, are less protective of privacy and embarrassment concerns than more traditional two party civil litigation."²¹⁹

Rights of access to bankruptcy records for the public at large, not just those creditors with interests in a particular bank-

decide, the bankruptcy judge will not be the presiding officer at the meeting, and will not be authorized to question the debtor as he is today. If there were to be any disputes resolved there, the judge might be present, but will not be present for the examination of the debtor, as this has caused too many problems of the dispute-decider hearing inadmissible evidence.

H.R. S 595, 95th Cong. (1997).

216. 11 U.S.C. § 107(a) (1994).

217. See *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994); *In re Foundation for New Era Philanthropy*, 23 Media L. Rep. 2498 (Bankr. E.D. Pa. 1995); *In re Phar-Mor, Inc.*, 191 B.R. 675 (Bankr. N.D. Ohio 1995); *In re Nunn*, 49 B.R. 963, 964 (Bankr. E.D. Va. 1985); COLLIER ON BANKRUPTCY ¶ 107.02 (Lawrence P. King ed., 15th ed. 1996).

218. *In re Foundation for New Era Philanthropy*, 23 Media L. Rep. at 2498.

219. *Id.* at n.2.

ruptcy estate, have been found necessary to protect individuals and businesses who may deal with a debtor after bankruptcy:

A bankruptcy filing is highly pertinent information to commercial enterprises in the geographic area where the debtor resides. Businesses must make daily decisions about entering into credit transactions with members of the public. The legitimate financial interests of businesses will be frustrated if the filing of a bankruptcy case is maintained on a confidential basis. The need of the public to know of the filing of the bankruptcy case, and the right of the news media to obtain and publish this information outweighs the debtors' desire to avoid the embarrassment and difficulties attendant to the filing of bankruptcy. Bankruptcy debtors are not entitled to be protected from publicity about the filing of the bankruptcy case.²²⁰

Few courts have visited the issue of access to materials in a main bankruptcy case and contested matters. They have all upheld the public right of access recited above.²²¹

The few courts faced with an issue regarding public access to materials in adversary proceedings have applied 11 U.S.C.S. §107(a) to the materials in those proceedings without discus-

220. *In re Laws*, 1998 WL 541821, at *715-14 (Bankr. D. Neb. 1998).

221. For access to records in a main case, see *In re Orion Pictures Corp.*, 21 F.3d 24 (2d Cir. 1994) (licensing agreement in operations of debtor); *Simmons v. Deans*, 935 F.2d 1287, 1991 WL 106160 (4th Cir. 1991) (unpublished disposition) (petition cover sheet); *In re Itel Corp.*, 17 B.R. 942 (9th Cir. BAP 1982) (list of creditors); *In re Barney's, Inc.*, 201 B.R. 703 (Bankr. S.D.N.Y. 1996) (investment proposal); *In re Foundation for New Era Philanthropy*, 23 Media L. Rep. 2498 (Bankr. E.D. Pa. 1995) (list of creditors); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (examiner's records); *In re Moramerica Fin. Corp.*, 158 B.R. 135 (Bankr. N.D. Iowa 1993) (list of creditors); *In re Lazar*, 28 Fed. R. Serv. 3d 52 (Bankr. C.D. Cal. 1993) (examiner's materials); *In re Lomas Fin. Corp.*, 1991 WL 21231 (S.D.N.Y. 1991) (preliminary plan of reorganization); *In re Revco D.S., Inc.*, 18 Media L. Rep. 1591 (Bankr. N.D. Ohio 1990) (examiner's report); *In re Apex Oil Co.*, 101 B.R. 92 (Bankr. E.D. Mo. 1989) (examiner's report and records); *In re Nunn*, 49 B.R. 963 (Bankr. E.D. Vir. 1985) (list of creditors); *In re Epic Assocs. V*, 54 B.R. 445 (Bankr. E.D. Vir. 1985) (list of Creditors); *In re Bell & Beckwith*, 44 B.R. 661 (Bankr. N.D. Ohio 1984) (list of creditors); *In re DeLorean Motor Co.*, 31 B.R. 53 (Bankr. E.D. Mich. 1983) (records of 2004 examination). For access to records in contested proceedings, see *In re Bennett Funding Group, Inc.*, 226 B.R. 331 (Bankr. N.D. N.Y. 1998) (contested application for interim compensation); *In re 50-Off Stores, Inc.*, 213 B.R. 646 (Bankr. W.D. Tex. 1997) (hearing on contested retention of professional); *In re Continental Airlines*, 150 B.R. 334 (D.Del. 1993) (contested fee application); *In re Sherman-Noyes & Prairie Apts. Real Estate Inv. Partnership*, 59 B.R. 905 (Bankr. N.D. Ill. 1986) (objection to claim); *In re Reliable Investors Corp.*, 44 B.R. 904 (Bankr. W.D. Wis. 1984) (contested motion to convert).

sion.²²² However, as discussed previously, adversary proceedings are distinguished in 28 U.S.C.S. §§ 1334 & 157 from cases under title 11. Interpreting the recitation in 11 U.S.C.S. §107(a) to “papers in a case under this title” to include papers in proceedings “related to a case under title 11,” as defined in 28 U.S.C.S. §§ 1334 & 157, arguably renders these provisions meaningless. It is thus strongly arguable, that 11 U.S.C.S. §107 does not speak to adversary proceedings. If so, any right of public access to judicial records in adversary proceedings, particularly for suits only related to a case under title 11, arises through the common law as for any other civil suit.²²³

Any of these rights of public access to materials in bankruptcy cases or adversary proceedings are subject to some limitations. These limitations include issuance of protective orders, sealing and redacting materials, and possibly expungement. Imposition of these limitations is allowed through the bankruptcy code, rules of procedure and the common law. Application of these various means to limit access by the courts has been inconsistent and very fact driven.

First, as Congress giveth it taketh away, by providing in 11 U.S.C.S. §107(b) that papers and records filed in a case under title 11, may be protected by the bankruptcy court in order to: “(1) Protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) Protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.”

The court may limit access to the lists of creditors and list of equity security holders filed in a main bankruptcy case for cause shown.²²⁴ In addition, the authority to limit access to certain information in a main case, which is not produced through a contested matter and is not filed with the court, has been found by the courts from several sources.²²⁵

222. See *In re Phar-Mor, Inc.*, 191 B.R. 675 (Bankr. N.D. Ohio 1995); *In re General Homes Corp.*, 181 B.R. 898 (Bankr. S.D. Tex. 1995); *In re Analytical Sys., Inc.*, 83 B.R. 833 (Bankr. N.D. Ga. 1987); *In re Hope*, 31 B.R. 423 (Bankr. M.D. Ga. 1984).

223. Of course, in the Third Circuit, this right would rise to one under the First Amendment.

224. FED. R. BANKR. P. 1007(l).

225. See FED. R. BANKR. P. 9018:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity *In respect* of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that

Limitations on access in contested matters are found through FED. R. CIV. P. 26(c), made applicable through FED. R. BANKR. P. 9014.

There are few published opinions concerning sealing of materials filed with the court which are generated in main bankruptcy cases or contested matters. The courts that have visited this area have cited to 107(a) and looked to precedent under FED. R. CIV. P. 26(c)(7) to interpret the language of 107(b) and the tests to meet under those definitions.²²⁶ Beyond merely sealing a record, debtors have sought to expunge their entire bankruptcy case record.²²⁷

Only one Court of Appeals has heard an issue involving bankruptcy court records. In *Orion Pictures*, the Second Circuit stated that §107(a) is a codification of the common law right of access to court records.²²⁸ The court also found that §107(b) provides a mandatory list of exceptions to that codified, common law right of access.²²⁹ Two lower courts have taken this proscription farther, finding that the protections afforded under §107(b) are not merely mandatory, but also exclusive to any other protections otherwise found at common law.²³⁰ Other courts have found that §107(b) is a codification of merely a portion of the

are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

See also *In re Handy Andy Home Improvement Ctrs., Inc.*, 199 B.R. 376 (Bankr. N.D. Ill. 1996) (finding FED. R. BANKR. P. 9018(1) & (3) to authorize the court to protect unfiled documents and other information produced through an uncontested FED. R. BANKR. P. 2004 examination); *In re Apex Oil Co.*, 101 B.R. 92 (Bankr. E.D. Mo. 1989) (finding that authority to limit access to unfiled documents in a main case may be found in FED. R. CIV. P. 26, through FED. R. BANKR. P. 9014, only when production is contested). Many other courts have found the authority in the Federal Rules of Civil Procedure to limit access to unfiled materials to apply in main bankruptcy cases whether objections to production have been lodged or not. See *In re Symington, III*, 209 B.R. 678, 685-89 (Bankr. D. Md. 1997); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 433-36 (S.D.N.Y. 1993). Other courts have found no authority to limit access to unfiled materials in a main bankruptcy case exists without objections. See *In re Dinubilo*, 177 B.R. 932 (E.D.Cal. 1993); *In re DuPont Walston, Inc.*, 4 Bankr. Ct. Dec. 61 (Bankr. S.D.N.Y. 1978).

226. See *supra* note 221.

227. See *In re Cortez*, 217 B.R. 538 (Bankr. S.D. Tex. 1997) (applying Fair Credit Reporting Act); *In re Whitener*, 57 B.R. 707 (Bankr. E.D. Va. 1986) (applying § 107(b)(2)).

228. See *In re Orion Pictures Corp.*, 21 F.3d 24 (2d Cir. 1994).

229. See *id.* at 27-28.

230. See *In re Phar-Mor, Inc.*, 191 B.R. 675 (Bankr. N.D. Ohio 1995).

protections against access found under the common law.²³¹ These courts find that other bases for limiting access under the common law remain available.²³²

The boundaries on limitations to public access to materials in adversary proceedings are less clear. Depending upon the applicability of §107 to adversaries, the grounds for limiting access in both §107(b) and FED. R. BANKR. P. 7026 may apply. If §107 does not apply to adversaries, then the grounds for limiting access discussed in the previous section on civil suits, primarily the definition of judicial records and precedent established under FED. R. CIV. P. . 26(c) will apply. Several courts, without referring to any difference between the records held by the court in a main case and an adversary proceeding, have applied the precedent of the civil suits as regards the definition of judicial records.²³³ Sounding much as the courts hearing civil suits, these courts find that, "The smaller the role documents play in the adjudicative process, the less of an interest the public has in them."²³⁴

A dichotomy emerges when one compares public access rights to proceedings in bankruptcy with those rights in civil and criminal cases. It appears that the public is afforded access rights to proceedings and records in the main bankruptcy case, and any associated contested matters, most similar to the level of access rights found in criminal prosecutions. Public access rights to proceedings and records in adversary proceedings, however, are equivalent to those found in civil suits.

In the pre-adjudication phase of each of these three areas of the law, information gathering, and disputes over that gathering, predominate. In civil suits, the products of discovery and the process itself are private between the parties. There is no public access rights to depositions, which are held privately, nor to materials, which are often not filed with the court and even if filed may be outside the scope of judicial records subject to public access rights. Hearings before a judge, and those materials

231. See *In re Bennett Funding Group, Inc.*, 226 B.R. 331, 336 (Bankr. N.D.N.Y. 1998); *In re 50-Off Stores, Inc.*, 213 B.R. 646, 659 (Bankr. W.D. Tex. 1997).

232. See *id.*

233. See *In re Bennett Funding Group, Inc.*, 226 B.R. 331 (Bankr. N.D.N.Y. 1998); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993); *In re Apex Oil Co.*, 101 B.R. 92, 99 n.10 (Bankr. E.D. Mo. 1989) ("the Underlying Documents are not judicial records in that they have not been filed and they are not being used by proponents in the resolution of substantive legal rights"); *In re Sherman-Noyes & Prairie Apts. Real Estate Inv. Partnership*, 59 B.R. 905 (Bankr. N.D. Ill. 1986).

234. *In re Apex Oil Co.*, 101 B.R. at 102.

the judge uses to make substantive findings, are subject only to a common law right of public access, which is limited by both the court's ability to seal for good cause and the possibility of a finding of constitutional interests overriding the interests of the public to know.

In criminal prosecutions, the products of discovery and the process itself are private. Depositions, interrogations and other forms of questioning, while compelled, are still held outside of the public eye. Materials found through investigations are, as with most civil discovery materials, not filed with or held by the court. The various hearings held before a judge at this point are numerous, and the public is afforded a right of access to the hearings through the First Amendment, a much stronger right than that afforded to civil hearings, subject only to overriding constitutional interests of the accused and third parties.

Information gathering in the main bankruptcy case closely parallels the process of compelled questioning in criminal prosecutions. However, while questioning is held privately in criminal prosecutions, it is in fact held publicly for most proceedings in bankruptcy,²³⁵ even if not required by law. In addition, the information gathered is mandated by law and rules of procedure, unlike in civil suits. Further, a statutory and common law right of public access is afforded any materials filed with the bankruptcy court, whether those materials rise to the level of judicial records or not,²³⁶ subject to a much more limited ability to seal records than that found in civil suits.

Information gathering in adversary proceedings is equivalent to that in civil suits. The information is gathered in private, and arguably, the public is afforded the same access rights under the common law to any judicial records as in any civil suit.

In the adjudicative phase of each of these three areas of the law, admission of evidence to the judge or jury predominate. In civil suits, the hearings and trial are open to the public under the

235. Most first meetings of creditors are generally held as a trailing docket. They are most often held outside of federal buildings and not in a courtroom. All debtors and creditors are present, listening to the depositions of the others, along with anyone else who happens to attend.

236. In approximately 80% of the cases in this district, no hearing is ever held before a judge. In most cases, the orders discharging and closing the case are the only orders entered in the case. In many districts, authority to sign the orders discharging and closing the case is delegated to the clerk, and a judge is not involved in the case at all and never sees any of the materials held by the clerk. Indeed, outside of some creditor motions to release liens, abandon property or modify the automatic stay, judges rarely see any of the information generated in this portion of the case.

common law, limited by the sound discretion of the trial judge. In criminal cases, the hearings and trial are open to the public under the First Amendment, limited only by a overriding constitutional interest of the accused or a third party. In contested matters in a bankruptcy and adversary proceedings, all hearings and trials are open to the public pursuant to a rule of procedure containing no enumerated exceptions.²³⁷

Finally, the post-trial proceedings and information gathered in criminal prosecutions is quite similar to the information gathered in case opening and initial examinations of the debtor in a main bankruptcy case. However, while the information gathered is similar in scope, the level of general public access afforded to that information in bankruptcy greatly exceeds that afforded in the criminal prosecution.

The information gathered in a criminal pre-sentence investigative report mirrors that found in the bankruptcy petition and accompanying schedules and statements:

The presentence report describes the defendant's character and personality, evaluates his or her problems, helps the reader understand the world in which the defendant lives, reveals the nature of his or her relationships with people, and discloses those factors that underlie the defendant's specific offense and conduct in general.²³⁸

Similarly, preliminary bankruptcy documents contain information which helps the reader understand the world in which the defendant lives. It describes what he does for a living, where he works, how long he has worked there, and reveals the nature of his relationships with people by showing where he lives, how long and to some extent whom with, and the contents of his home. It describes the defendant's character and personality by showing life circumstances such as what he reads, medical problems, where he spends his income, detailed cash flows, information on schooling, any businesses entered into, lawsuits pending, and if and where he attends church.

Further similarities between bankruptcy and criminal prosecutions can be found by comparing the presentence investigation in criminal proceedings with the examination of the debtor's affairs in bankruptcy. In criminal prosecutions, the

237. Those few published opinions discussing closure of hearings and trials refer to 11 U.S.C. § 105 (1994) and FED. R. BANKR. P. 9018 for authority to order any relief that justice requires, including closure.

238. *United States v. Corbitt*, 879 F.2d 224, 230 (7th Cir. 1989) (citing PROBATION DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *THE PRESENTENCE INVESTIGATION REPORT* 1 (2d ed. 1984)).

"[s]entencing proceedings, and particularly the presentence investigation, often involve a broad-ranging inquiry into a defendant's private life, not limited by traditional rules of evidence,"²³⁹ while examinations of the debtor at the meeting of creditors, 2004 examinations and investigations by the trustee are "extremely broad and Collier indicates that [they are] in the nature of an inquisition and consequently the field of inquiry is wide and within the limitations prescribed any question is permissible which seeks to ascertain facts concerning debtor's conduct, property and affairs."²⁴⁰

Presentence investigation reports are considered confidential and are filed under seal; third party public access is not allowed except upon a showing of a compelling, particularized need for disclosure.²⁴¹ The basis for this policy is found through comparisons of the procedures, information and privacy interests of parties in the presentence investigation with those in a Grand Jury proceeding.²⁴² This same type of comparison to Grand Jury proceedings and privacy interests has been made in conjunction with the examinations of the debtor's affairs in bankruptcy.²⁴³ A strong argument can be made that the same policies of confidentiality and general public access found applicable to presentence investigation materials should also apply to information concerning debtor's affairs in a main bankruptcy case.

IV. THE GOALS OF COLLECTION AND PUBLIC ACCESS

The information collected and filed with bankruptcy courts is presented ostensibly to effect the purposes underlying the bankruptcy law: equitable distribution of a debtor's assets to

239. *Corbitt*, 879 F.2d at 230.

240. *In re Larkham*, 24 B.R. 70, 72 (Bankr. D. Vt. 1982); *see also In re Lazar*, 28 Fed. R. Serv. 3d 52 (Bankr. C.D. Cal. 1993); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993); *In re Woods*, 69 B.R. 999, 1004 (Bankr. E.D. Pa. 1987); *In re Baldwin United Corp.*, 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985); *In re Vantage Petroleum Corp.*, 34 B.R. 650 (Bankr. E.D.N.Y. 1983).

241. *See* *United States v. Huckaby*, 43 F.3d 135 (5th Cir. 1995); *Corbitt*, 879 F.2d at 224; *United States v. McKnight*, 771 F.2d 388 (8th Cir. 1985); *United States v. Charmer Indus., Inc.*, 711 F.2d 1164 (2d Cir. 1983); *United States v. Martinello*, 556 F.2d 1215 (5th Cir. 1977); *United States v. Dingle*, 546 F.2d 1378 (10th Cir. 1976).

242. *Corbitt*, 879 F.2d at 231-32.

243. *See In re Baldwin United Corp.*, 46 B.R. 314, 317 (Bankr. S.D. Ohio 1985) (comparing the investigation of debtor's affairs by examiner to a "civil grand jury"); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 432 (1993) (sealing materials on investigation of debtor); *In re Mantolesky*, 14 B.R. 973 (Bankr. D. Mass 1981) (holding an examination under bankruptcy is an inquisition); *In re Larkham*, 24 B.R. 70, 71 (finding meeting of creditors to be a broad inquisition).

creditors and a fresh start for the honest, but unfortunate debtor. To accomplish these goals quickly and efficiently, forms and procedures have developed to assist in locating estate assets, identifying creditors with valid claims to those assets, distributing the assets equitably to those creditors and identifying debtor and creditor fraud.

In light of these goals, the threshold question to be answered before the issue of access becomes whether the information collected is legitimately needed to meet the needs and goals of the bankruptcy process. One measure of the relevance of information may be the frequency of objections to presenting the information or appearing at meetings. Another measure may be the frequency of requests to review types of information and documents.

The documents and proceedings eliciting the most personal, probing information of debtors, the case opening documents and first meeting of creditors, are found in the administrative portion of a bankruptcy case. The judge is not involved in the first meeting of creditors, and outside of business cases, it is extremely uncommon for the judge to use the petition, schedules and statements to gather information. The bankruptcy clerk's office uses the cover sheet information to identify a case, the attorney concerned and for the statistical information supplied, but does not use the other case opening documents. While the court does not use the schedules and statements, they are some of the most frequently reviewed documents in a case. They are reviewed by trustees, creditors named in the schedules and other parties who are trying to determine if they are a creditor in the case.

While the case opening documents probably contain the most private information of debtors, the attachments to proofs of claim, along with the increasing ability to search multiple cases for references to a specific creditor, provide the most private information concerning creditors. Again, the proof of claim is presented in the administrative portion of a bankruptcy case and is rarely reviewed by a judge, except for objections based on late filing. The claims are used by trustees and debtors-in-possession and reviewed by other creditors. The proof of claim form itself must be filed and the content is not controversial. The relevance and need for the attachments to the claim is not a subject of discussion. Attachments to claims supply information needed to substantiate a claim, serving a legitimate purpose under bankruptcy law and procedure by alleviating the need to object to every claim, and therefore, eliminating unnecessary hearings and judicial involvement in administrative matters.

The onset of electronic records and clerk's databases allows probing searches for creditor information across all cases, providing views of forms and accounting procedures used by creditors, customer lists and a review of a creditors uncollectible accounts receivable. Depending on the number of cases a creditor is involved in and the information it supplies as attachments to proofs of claim, a very detailed financial and operational picture of a business can be compiled.

Other documents and pleadings are necessary to claim rights under various sections of the bankruptcy code or other law. Most of these other documents are presented in those portions of a bankruptcy case that are not administrative and require review and determinations under the law by a bankruptcy judge. The relevance of these documents and any attached materials are subjects for hearings before the judge.

Excluding the requirement to provide social security numbers, the information requested of debtors and creditors in the administrative portion of a bankruptcy case in opening documents and assertions of claims is rarely challenged as irrelevant or overreaching. In addition, objections to appearing at the first meeting of creditors are equally rare. In contrast, objections to appearing and supplying information at Rule 2004 examinations and in discovery in adversary proceedings are common.

As stated previously, outside of discovery disputes, the collection of social security numbers elicits the most frequent and growing number of challenges. While there are few published opinions regarding this issue, clerks' offices receive several petitions each year where debtors or petition preparers at first refuse to supply their social security number.²⁴⁴ Those clerks' offices that provide access to pleadings over the Internet relate increasing instances where parties object to having their social security number displayed. As discussed, the social security number is used by creditors to identify debtors and link their account records, and by trustees and the Office of the United States Trustee to identify unlawful filings of bankruptcy petitions. Queries regarding identifying information, especially the social security number, are probably the most frequent requests for information received at clerks' offices. These uses clearly serve a legitimate need in the bankruptcy process.

It is arguable that social security numbers should not be required of debtors, and they definitely should not be offered for

244. See *In re Crawford*, 194 F.3d 954 (9th Cir. 1999); *In re Adair*, 212 B.R. 171 (Bankr. N.D. Ga. 1997); *In re Anderson*, 159 B.R. 830 (Bankr. N.D. Ill. 1993); *In re Austin*, 46 B.R. 358 (Bankr. E.D. Wis. 1985).

general public access. The purposes cited for requiring these numbers are legitimate public purposes, preventing fraud and increasing efficiency by quicker identification of debtors and protection of creditor rights. However, these numbers are used too often to commit crimes.

Prior to the ability to catalog and compare more extensive information in a database, the social security number supplied the easiest and only way to meet these purposes. The social security number remains the easiest means to both identify debtors and other parties and to determine if a filing is lawful. However, new technology now provides other means to accomplish the legitimate need for identification. Inclusion of other information in a database such as multiple debtor addresses, employers, specific identification of secured collateral and creditor identification can collectively help identify debtors and parties using search and compare abilities lacking under previous technology. Placing this information in a searchable database will require labor, and the programs and equipment to provide the search capabilities will require funding, but these other means do exist today, lending question to the legitimacy of continued use of social security numbers in the bankruptcy process.²⁴⁵

While for the most part, the information collected is relevant and legitimately meets a need under the bankruptcy process, it should also be asked prefatory to questions of access rights, whether the information should be collected by the courts or others. Bases for these decisions are found through the interplay between the demographics of the users of the information and practicality and political considerations.

Arguably, if the court does not use a class of materials, it should not be filed with the court. In both civil and criminal contexts, the only materials filed with the court are those for which there is a high probability of use by a judge. As a consequence of this line of reasoning, the schedules and statements of affairs should probably not be filed with the courts. In the majority of bankruptcy cases there is no expectation that these documents will be used by a judge. They will never lie under the definition of a judicial record as that term is developing in the courts. Considerations of practicality also bear against filing these documents with the court. Due to budget restraints and

245. Courts in other countries often provide their own, unique identifiers to parties, which presumably can be cross checked to look for other cases with which that person may be involved. See Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555, 563 (1998) (discussing German practice and the *Bundesdaten Schutz Gesetz*).

limits on the number of judges, any bankruptcy court desires to collect only that information which it needs to adjudicate issues brought to it and to send out notices it is required to send. The ill considered collection of information by the courts simply because it is used by some parties burdens both judges and the court system, which must index, store and provide access to it.

Scant records of past discussions on this issue indicate that the opening documents were envisioned to be filed with the Office of the United States Trustee.²⁴⁶ This place of filing is most logical because the U.S. Trustee, trustees appointed and overseen by that office and, to a lesser extent, creditors are the parties using these documents. While logical, filing with the U.S. Trustee would require an infrastructure of personnel, office space and equipment which that office does not possess nor is likely to receive funding to provide.

With these considerations in mind, the court could continue to act as the place of filing of all information in a bankruptcy case. The burden of filing and storage would remain on the court. However, differing rules applicable to access for the different classes of documents could alleviate the current burden of providing unlimited access. Legislation could be enacted defining these documents as agency records of the Office of the United States Trustee. Physical and/or electronic means could then be used to distinguish between the types of records for access purposes. This type of distinction or segregation has already been considered by the courts in order to meet access and filing requirements for income tax returns under proposed legislation. While such distinctions would have been difficult to provide under old technology, electronic forms of documents and information make them simple. This means of filing would allow a compromise between the goals of the court system with those of the practical considerations relating to any requirement that case opening information belong to the U.S. Trustee system.

Finally, we can reach the central issue of access to the information and proceedings in bankruptcy. Resolution of this issue follows answering several questions. What are the bases for the current system of access? What are the problems of the current system? What benefits does access provide? What harms do the current levels of access cause? Do the benefits outweigh the harms? If changes are needed, what alternative access structures would be more balanced in today's technology?

As discussed previously, under the bankruptcy system today, levels of access rights are bifurcated. The general public is

246. See *supra* note 189.

afforded nearly unlimited access to records and proceedings in the main bankruptcy case. The general public is afforded much more limited access to records and proceedings in adversary proceedings, similar to access provided in civil cases. How or why the current levels of access were determined or why they vary is not clear. Current access levels probably arose as the schizophrenic outcome of the interplay between the traditional faction, which considers the debtor an admitted criminal upon filing and bankruptcy analogous to a criminal sentencing process, and the liberal faction, which regards bankruptcy as a rehabilitative process for debtors, which attempts to lessen creditor contests over limited assets.

No matter the circumstances behind its development, the current access rules have several problems. They are confusing due to the lack of uniformity of access to records between various portions of a case. The access rules as regards the main bankruptcy case are inconsistent with the treatment of judicial records overall and even similar records in civil, criminal and other government contexts. Further, due to new technology, current access rights in bankruptcy impinge unnecessarily on privacy rights, thus threatening individuals and the courts.

These shortcomings are magnified in the new electronic environment as evidenced by the increasing complaints relating to privacy fears. As the balance between privacy and public access that existed in fact under the old technology, if not under the law, is tipped, we are left with unthought of consequences. Certain records and information in the main bankruptcy case, public under the current system, should probably no longer be assumed public, and in some instances, alternate information should be collected.

Arguments advocating keeping the current levels of public access to bankruptcy information and proceedings in the main bankruptcy case cite to five general categories of benefits provided by this access. First, general public access forces integrity in the bankruptcy system by placing all that happens under harsh public scrutiny. Second, flowing from forced integrity, general public access helps to maintain confidence of the public in the bankruptcy system. Third, general public access allows "accurate, reliable data about the bankruptcy system" to be collected, aiding evaluation and speeding change to bankruptcy laws and processes.²⁴⁷ Fourth, access to all bankruptcy information by the

247. See NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS* (1997); Joseph A. Guzinski, *Government's Emerging Role as a Source of Empirical Information in Bankruptcy Cases*, 17 AM. BANKR. INST. J. 8

general public helps lenders to make better informed decisions on extending new credit, thus helping to alleviate harm to creditors and contributing to efficiencies in the credit markets.²⁴⁸ Finally, access to all information in a specific case by that debtor's creditors is necessary because those creditors are the new interest holders in the estate and are entitled to know everything, even otherwise private, about the debtor and estate in order for the bankruptcy process to work.²⁴⁹

Clearly, all of these goals are legitimate needs and interests. The first three points reflect the general interest of the people in monitoring and evaluating a government process. As it regards bankruptcy, this interest is reflected in the ability to review the effects of the law as a whole and the actions of individual judges applying that law. The fourth point reflects the interests of the commercial segment of the public, and to a much lesser extent the general public, to use the credit information gathered in the bankruptcy process for uses other than adjudicating a case. The fifth point raises an issue that can be characterized as structural to the bankruptcy system in that information is vital to creditors who play a large role as parties in specific cases and thus are a contributory part of the bankruptcy system.

Arguments advocating altering the current levels of public access to bankruptcy information and proceedings cite to six general categories of harms from this access. First, unlimited access impinges unnecessarily on privacy rights, by providing more access than is necessary to achieve the public benefits of evaluating and monitoring a government process. Second, unlimited access and dissemination rights under new technology chills those seeking redress under the bankruptcy laws through the courts of the use of the rights to use the courts. Third, unlimited access limits the fresh start, an integral element of the bankruptcy law, by placing a stigma upon debtors and limiting access to new extensions of credit. Fourth, current access levels result in inconsistent and discriminatory treatment of parties and information across federal causes of action. Fifth, unlimited access and dissemination rights contribute unnecessarily to threats of physical harm to parties. Finally, unlimited access and dissemination rights contribute unnecessarily, and probably cause, economic harms to parties, identity theft, credit fraud and

(1998); *Should You be Able to Access Bankruptcy Files from the Internet?*, 32 Bank. Ct. Decisions 1 (1998).

248. See *In re Laws*, 223 B.R. 714 (Bankr. D. Neb. 1998).

249. See *In re 50-Off Stores, Inc.*, 213 B.R. 646, 654 (Bankr. W.D. Tex. 1997).

lender redlining, which would not occur with more limited forms of access.

The first two points relate to the legitimate purpose of balancing and protecting constitutional rights of all types of parties through limits on access. The third point reflects the need to consider all the goals of the bankruptcy system in determining access levels. The fourth point reflects the need for consistency in protecting information required by the courts. The final two points relate to recent concerns raised due to new technology and reflect the need to consider the ramifications of access no matter the type of technology available.

Determining whether the benefits outweigh the harms requires a discussion of the points raised by each side, including the merit and magnitude or contribution of the benefit or harm. Since those arguing change do not dispute that some level of access is necessary to provide for the legitimate public purposes recited, it would be most productive to look at the merit and magnitude of the harms claimed from extensive access.

The first harm stated, unnecessary intrusion on the right to privacy, is perhaps the greatest harm. The right of privacy is a fundamental, constitutionally protected right.²⁵⁰ While so protected, debtors seeking relief under the bankruptcy code acquiesce to some invasion of their privacy rights. Advocates of limited disclosure argue that while debtors agree to supply private information for the limited purpose of administration of their bankruptcy case, it does not follow that they also are agreeing to full disclosure to all the world. They argue further, that while full access of parties to the case to the information collected is necessary to administer the case, it does not follow that unlimited access to the general public is required or necessary for that administration. They state that, "the fact that an event is not wholly 'private' does not mean that an individual has no interests in limiting disclosure or dissemination of the information."²⁵¹

The basis given for requiring such extensive access is the probability of participation from unlisted third parties in a case, whether as a creditor newly come forward or as informant supplying information on assets transferred by fraudulent debtors. While this purpose is laudable and legitimate, advocates of limited access argue that it is not being fulfilled by unlimited access. Very rarely does public participation from publication of bank-

250. See *supra* Pt. II.

251. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770-71 (1989) (citation omitted).

ruptcy information come as a result of the public broadcast of information from court records by the media and, certainly, the general public does not come to the courthouse to randomly peruse bankruptcy case files. Most queries received at the court from third parties come from entities and individuals who heard from a debtor or a creditor that had received a notice directly from the court that a specific debtor had filed, or from lenders who are not trying to participate in a case but are using the court as a free credit reporting service. In other words, members of the general public do not participate in bankruptcy cases because they hear of them from the news media or because they avail themselves of unlimited access to the courts.

Advocates argue further that provision of records on the Internet will not change this result. People will not go to a court website everyday to review newly filed cases to determine if they should participate in a case. They will not read newspapers or newspaper websites daily to review a list of those who filed bankruptcy to determine if they should participate in a case. They will acquire bankruptcy information under the same circumstances as they do with paper records, from debtors and through the grapevine from those creditors who received notice directly from the court about a case.

Advocates of limited disclosure are, therefore, correct. Privacy rights are being unnecessarily invaded because the purpose sought to be served is not served by the access currently allowed.

In addition, advocates of limited disclosure argue that treatment of private information in bankruptcy is inconsistent with protections afforded that same information in other contexts. Most of the information supplied by debtors is financial, other information in the petition regarding one's family, medical services received and religious affiliations fall under specific areas where the Supreme Court has spoken to constitutional protections of privacy. Add to the list, social security numbers, and almost every part of the opening documents in an individual bankruptcy case are either specifically protected private information or information that is afforded very restricted access in other venues.²⁵²

Outside of social security numbers, there is little argument that this private information is needed to properly administer a bankruptcy case and protect creditor rights. However, the point is well made that the means necessary to meet these needs differ

252. See *Methodist Hosp., Inc. v. Sullivan*, 91 F.3d 1026, 1031 (7th Cir. 1996); *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476-78 (6th Cir. 1983); *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 680-82 (Wash. 1982).

greatly from the amount of access necessary to monitor the bankruptcy system or provide for participation of third parties in a specific case.

While the point raised regarding this harm has great merit, the magnitude of the harm from current unlimited disclosure is a subject of debate. The magnitude of this harm varies with the measurer. While one is horrified at disclosure of his or her own financial affairs, one usually doesn't think twice about disclosure of those same affairs of others.²⁵³

It will always be difficult to measure the current harm from loss of a fundamental right. However, the fact remains that society as we know it depends upon these fundamental rights. It should always be asked if the need espoused cannot be filled in any other way before so easily giving up such fundamental rights as privacy. Chipping away at fundamental rights is indeed an insidious danger.

Those in favor of unlimited access also argue that the magnitude of the invasion of privacy is in actuality low and debtors receive a trade off, bankruptcy relief for loss of privacy. That leads into questions of the propriety of relinquishing one constitutional right to exercise another.

Proponents' arguments regarding chilling of access to the courts for redress under the bankruptcy laws may be considered amusing and facetious in light of the number of bankruptcy cases filed in the last ten years. This great level of filing occurred in spite of unlimited access to paper records. Under these circumstances, it is difficult to sustain an argument that disclosure of private facts in bankruptcy chills debtors from accessing bankruptcy courts.

Advocates of limiting access argue that while it is true that disclosure does not chill access to the courts with paper records, with electronic public dissemination of the private information in bankruptcy tied to social security numbers and other personally identifiable information, the probability increases enormously that filing may indeed be chilled. They also argue that one should not have to give up one constitutional right, the right to privacy, to exercise another constitutional right, the right to seek redress through the courts because:

[t]here is no single divine constitutional right to whose reign all others are subject. When one constitutional right cannot be protected to the ultimate degree without violat-

253. See introduction of this paper; Glenn R. Simpson, *Plan to Release Judge's Financial Data by Online Concern is Blocked by Court*, WALL ST. J., Dec. 8, 1999, at A10.

ing another, the trial judge must find the course that will recognize and protect each in just measure, forfeiting neither and permitting neither to dominate the other.²⁵⁴

While the right to seek redress through the courts is often espoused, the extent of any such right is fuzzy.²⁵⁵ It is clear that there is no right of access to the bankruptcy court under the Due Process Clause of the Fourteenth Amendment.²⁵⁶ However, some type of right to access bankruptcy court exists under other constitutional provisions as has been found in other contexts.²⁵⁷ "It is also true that, [i]f the debtor did not file bankruptcy, that information would almost never be available on demand to the public at large (and certainly not under penalty of perjury)."²⁵⁸ Moreover:

Rather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself.²⁵⁹

Advocates of limiting access argue that the goals stated to justify unlimited access, participation of unknown members of the public in a specific case and protection of creditor rights, can be met by more limited access, which protects redress through the court. They argue that the level of access currently provided is not present just for the goals stated, but is there for other purposes. In particular, they state that the underlying purposes for unlimited access include discouraging debtors from filing and using public employees and funds to collect information for commercial purposes outside of the needs of bankruptcy. They argue that these unstated purposes are filled at too high a cost to privacy and the bankruptcy system.

Indeed, publication of extremely private, personally identifiable information is a strong impetus against filing. If discourag-

254. *United States v. Chagra*, 701 F.2d 354, 365 (5th Cir. 1983).

255. See Carol R. Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999); J. Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be permitted to Keep Identities Confidential?*, 37 HASTINGS L.J. 1 (1985).

256. See *United States v. Kras*, 409 U.S. 434 (1973).

257. See *McDonald v. Smith*, 472 U.S. 479 (1985) (Petition Clause of the 1st Amendment); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (Petition Clause of 1st Amendment); *Blake v. McClung*, 172 U.S. 239 (1898) (Article IV, Privileges & Immunities Clause).

258. *In re 50-Off Stores, Inc.*, 213 B.R. 646, 654 (Bankr. W.D. Tex. 1997).

259. *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 689 (Wash. 1982).

ing filing through the invasion of privacy caused by unlimited access is a basis for providing such access, losing rights to privacy seems a high price to pay when a lessor cost, redrafting the bankruptcy statute to embody more difficult filing requirements or lessened benefits to filing, would provide a better and more balanced solution to the perceived problem.

Arguments of proponents for limiting access regarding the fresh start seem specious. The public should be able to review credit information and be advised that debtors have defaulted, pay slowly or have filed bankruptcy. Even assuming that the release of information by the court harms the fresh start, the magnitude of that harm must be small. Discharged debtors have more opportunity to receive credit than ever before. Many creditors even seek out and solicit extensions of credit to newly discharged debtors because they cannot receive another discharge for the next seven years. While this argument appears to have much lesser merit, it is also true that the public should not use the courthouse as a credit reporting agency, and the question becomes where the public should receive credit information.

Next, one can argue that access by third parties to materials in bankruptcy should be consistent with the level of access provided to similar materials in civil or criminal cases. One can argue that the difference in access is discriminatory against debtors in bankruptcy in two ways. First, discovery materials containing similar private information submitted as required through the Federal Rules of Civil Procedure are given more protection from disclosure than the same information submitted in a bankruptcy case. Second, specifically as regarding the opening documents in a main bankruptcy case, one can argue that these documents are analogous to presentence investigative reports in both content and usage, and therefore, case opening documents are given less protection from disclosure than the same type of document in a criminal case. Finally, it can be argued that the same opportunities to abuse the forced discovery in civil cases exist in bankruptcy and the rationale behind the decision in *Seattle Times* should be applied to protect the debtor and other parties drawn into a bankruptcy case.

In rebuttal, advocates of disclosure argue that the forced discovery attendant in both opening documents and the required deposition, the first meeting of creditors, meet the goal of extremely speedy administration of bankruptcy cases; time is money. In conjunction with this goal, unlimited public access will inform the public faster and lead quickly to both addition of any new, unlisted creditors and to information of unknown preferential or fraudulent transfers. In consideration of these goals

then, access to information must be greater than that allowed in a civil case.

Unquestionably, most of the information required in bankruptcy case opening documents is relevant, and requiring the information to be provided at the time of filing clearly meets the goals of speedy administration. No one appears to argue that this goal has no merit or that another system of data collection or discovery would better serve administration of cases. The second point concerning unlimited disclosure and participation of third parties in a case is much weaker. If unlimited disclosure was truly successful in meeting this goal, an argument could be maintained to keep such disclosure; however, as discussed previously, there is no evidence that unlimited disclosure serves this goal. Third parties do not receive information on cases due to unlimited disclosure. They receive information from the debtor and through the grapevine, from creditors who received their information due to the noticing requirements of the court in the Federal Rules of Bankruptcy Procedure.

No matter one's position on this point, the difference in treatment looks discriminatory. Indeed, to the extent bankruptcy case opening documents can validly be analogized to presentence investigative reports, it appears that those who commit the "crime" of bankruptcy receive fewer privacy protections than those who commit other crimes.

Finally, the points raised regarding physical and economic harms grow in merit with every passing day as reported accounts of identity theft and credit fraud increase exponentially. While claims of these harms have merit, it is argued that the magnitude of the harms is small, as they are speculative and hypothetical and the probability of these harms befalling any single debtor are low. While true even ten years ago, this argument loses strength every day as the reported cases of these harms increase. Currently, the bankruptcy electronic database is ripe for identity theft crimes and also provides a ripe ground for stalking individuals. While it is true that the probability remains fairly low that any one individual will suffer these harms from access to the electronic bankruptcy database, the probability that this database will be used to support such crimes is very high, especially when compared to the probability of use of the paper data files for such purposes.

This discussion establishes that privacy, a fundamental, constitutional right, and the right to seek redress under the laws through the courts, another constitutional right, are being harmed unnecessarily through application of common law and statutory rights of access to bankruptcy records. In addition, it

appears that the goals sought to be reached by providing the statutory level of access in bankruptcy, though laudable, are not successfully being met through that access. Therefore, not only is the balance of rights inverted due to current access levels, but the threat and probability of physical and economic harms befalling individuals is greatly increased unnecessarily because of it.

So, what level of access or privacy should be provided under the law? "How can the courts fashion and administer meaningful rules for protecting privacy without unconstitutionally setting themselves up as censors or editors?"²⁶⁰ How can the courts serve the public interests and not be "catering to prurient interests without proper public purpose or corresponding assurance of public benefit"²⁶¹ even though it is true that "[o]nce a matter is brought before a court for resolution, it is no longer the parties' case but also the public's case"?²⁶²

First, in evaluating any changes to access levels, one must consider both the state of access law and the goals of the bankruptcy system. At this time, no right to unlimited access to government records has been found to exist under the Constitution or common law.²⁶³ Unlimited access to records held by the courts is also not provided in either civil or criminal contexts. However, access by parties involved in a specific bankruptcy case to wide ranging information on debtors is necessary for the bankruptcy system to work.

Based upon these considerations, access levels to personal identifiers should be changed to reflect the level of participation of the requesting party to a specific case. Parties involved in a case should receive expansive access. However, the general public should only be provided access to those records where it serves the interest of the public in monitoring the process, a goal successfully met by various circumscribed levels of access.

Most of the interests stated by advocates of expansive access should and can be served through some limited form of access. The interests in quickly bringing unknown parties into a case and in discouraging filing should be served by means other than access to court records.

260. *Shulman, v. Group W Prod., Inc.*, 955 P.2d 469, 474 (Cal. 1998).

261. *In re Application of KSTP Television*, 504 F. Supp. 360, 362 (D. Minn. 1980).

262. *Brown v. Advanced Eng'g, Inc.*, 960 F.2d 1013, 1017 (11th Cir. 1992).

263. See *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 120 S.Ct. 483 (1999); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994); *Calder v. I.R.S.*, 890 F.2d 781 (5th Cir. 1989).

Access to the documents and information in specific cases, stripped of personally identifiable information, names, addresses, telephone numbers and social security numbers, should still provide all the information necessary to monitor the system as a whole, its application to specific individuals and individual entities. Even stripped of personal identification, enough information will be disclosed to evaluate debtors, the nature of debts, the administration of a case, and whether particular debtors, creditors, trustees or attorneys are receiving discriminatory treatment. In addition, this level of information retains enough character to identify the trustee, attorneys and judge involved to evaluate their respective performance. Further, access to the personally identifiable information by the court and Office of the United States Trustee should provide adequate ability to search for fraud and serial filing, especially considering that these are the entities that currently perform this function anyway.

Those materials that have infinitesimal probability of becoming judicial records and that contain information which can be provided to the judge by other means when necessary, in particular the petition, schedules, statements of affairs and creditor lists, could be held and access provided as applicable to the records of executive agencies. The access requirements and limitations of the Freedom of Information Act would presumably apply and could be administered by the court.

While the first three interests of expansive access advocates can be served through electronic records by similar means as those used in other government record contexts, such as removing personally identifying information from case data before releasing it to the general public as discussed above, the fourth and fifth points require more. Under the fifth point, the role of all parties in a case requires the ability to identify the debtor and other parties, and to receive complete information on debtor's affairs no matter how personal. Unarguably, parties involved in a specific case need some type of personal identification information of other parties and probably should receive this information from the courts to protect due process rights. In addition, third parties not listed in a case should be provided adequate information to determine if they are involved.

Under the fourth point, the access needs of the commercial interests in society also require personally identifiable information on specific cases and ultimate case status. It is harder to justify any access to personal identification information from court records for commercial third parties, as the benefits they seek from access are not related to monitoring the government function of the courts or contributing to the bankruptcy process.

However, it is also important to place value on the societal interest of the smooth flow of credit. The question under the fourth point becomes whether the courts should be the source of this information, or whether commercial third parties should rely on the other available sources which have this information and from which they receive all the other information they hold. The bankruptcy courts should not be a master credit bureau where lenders and commercial credit bureaus come for information. Credit bureaus receive most other information directly from lenders and should receive information on a bankruptcy filing from the same sources. Those lenders seeking information prior to extending credit should look to the credit bureaus for that information, not the bankruptcy court.

V. SOLUTIONS

The long term solution to these concerns requires action by Congress and many changes by the courts and debtors' counsel. The major requirement for long term change requires the judiciary, or another group, to propose changes to 11 U.S.C. §107. The most efficient change would be to eliminate it. Doing so would place access to bankruptcy records on the same foundations as access in other proceedings in the federal courts. Should such a change be untenable, legislation will be needed amending 11 U.S.C. §107 in two ways. First, language should be added stating that, though filed with the courts, the petition commencing a case and associated documents filed at case opening are not judicial records. Second, existing language in 11 U.S.C. §107 should be amended to provide that the same rules of access apply to judicial records in bankruptcy as in any civil case. Any amendment to define the term judicial records is probably premature and confining.

After making these statutory changes, processes will have to be derived that effect the intent of the changes. Any such new procedures adopted have to provide for the short time frames of the bankruptcy process. In addition, they must provide adequate information to the public and entities seeking to determine if they are parties to a case.

The solutions that follow primarily involve information in bankruptcy cases. Access to hearings and trials where a judge presides should remain open to all as is current practice. Access to those proceedings that are not held before a judge and that constitute discovery, should continue to be closed except to applicable parties as with any civil case.

To effect long term changes to the access ability of bankruptcy documents and information, various rules and forms will need to be changed and proposed. Rule 1005 of the Federal Rules of Bankruptcy Procedure should be amended. Other rules may have to be amended or proposed. Changes to official forms will need to be made reflecting any changes to the level of access and the techniques used to accommodate the varying access levels. Forms requiring such changes would include Official Form 1, the voluntary petition, Notice of Commencement of Case and First Meeting of Creditors, Application to Pay Filing Fee in Installments and the Notice of Discharge. Other forms may need to be designed to segregate personally identifiable information.

The specific changes to all of these rules and forms will reflect choices in regards to several forms of personally identifiable information. Amendments regarding identifying numbers can be made following a choice whether the social security number or tax identification number of debtors and petition preparers should continue to be required. If it is decided to keep this information in a case, then choices must be made on whether access should be restricted to the court and the Office of the United States Trustee or to the court, Office of the United States Trustee and parties in a case. While the requirement of other personally identifiable information is not debated, a similar choice on access must be made regarding names, addresses and phone numbers of, respectively, debtors, petition preparers, attorneys and creditors before any amendments to rules and procedures can be made.

Whether identifying numbers continue to be required or not, supporting a choice to restrict access of the general public solely to information that is not personally identified or otherwise sensitive requires that access be limited to information necessary to evaluate the system and enough specific information to allow a person to make an initial determination that they may be involved in a case. Such information would include: case number, chapter, filing state and county, name, address and phone number of debtor's attorney, name, address and phone number of the case trustee, name of the judge, gross information on the dollar value of assets and debts, the number of creditors, the legal description of any real property and the VIN of any automobiles. Case status information and dates would also need to be provided, including dates of: case opening, discharge, conversion, dismissal and closing.

Debtor and creditor names, addresses, phone numbers, account numbers, signatures and any identifying numbers,

should be segregated either by placement on a specific page of a form, a separate form, or placement in a separate field in an electronic form and database. The ability to search using combinations of this information would need to be available for the court to uniquely identify individual debtors on demand. All pleadings subsequent to the case opening documents would be identified by case number only. Any request for docket information would provide the case number, state, county, trustee and attorney names, addresses and phone numbers and a listing of case documents. Should it be found difficult to keep debtor names off of subsequent pleadings, then the schedules and statements would probably have restricted access to protect the privacy of the sensitive information they contain.

This system would protect privacy rights of debtors and creditors while allowing the general public access to relevant information to evaluate the bankruptcy process and enough information to determine if they should individually seek increased access to a case.

Means to seek such increased access should also be developed. Filing a proof of claim will probably be enough to gain access to a case. Attachments to the claim as well as execution of the claim under a perjury and good faith clause should foreclose any misuse of this process merely to gain access to cases. A motion seeking to be added as a party in a case could also be used for this purpose or for requests by news media and academia for access to special cases such as those of movie stars or political figures.

Provision of unrestricted access to case parties requires other changes. The presence of debtor information in separate fields easily provides the means to identify parties in a case through a search by a computer. Identification of parties in a case with the current combination of paper and automation is not as simple. In electronic files, a party identified by the debtor, or later admitted to a case, would need to be given a password by the court in a notice of commencement of case or another appropriate notice. That password could be unique to a case or be unique to an entity, and be linked to all cases that entity was involved in. If the password is unique to an entity, it could be a national level password or district level password. Access to a case could require entry of case number, debtor name, party name and the password provided by the court. These passwords could be time limited and could reflect access levels of court personnel, the Office of the United States Trustee, the case trustee or other types of parties.

Electronic information possessed by the courts prior to any enactment of these changes will require limited access or need to be redacted to reflect the access level of the entity seeking access. Providing several levels of access to information which is in electronic form, but in which identifying information is embedded and not in separate fields is more difficult. Access to the general public may have to be denied unless the information can be redacted.

As a final long term concern, the Fair Debt Collection Practices Act requires records of bankruptcy filings be removed from credit reporting files ten years after a case is closed. It can be argued that general public access to bankruptcy records should also be ended after ten years with reopening for access upon motion for good reason or cause.

As a practical, short term solution, courts can continue to treat paper records as the official court record and provide the same level of access to these records as required by the current system of access, pursuant to 11 U.S.C. §107. Any electronic court records, which have not been "filed" with the court, then fall outside of the bankruptcy statute and rules, and the court is free to fashion its own rules of access.²⁶⁴

These rules can distinguish between the types of electronic documents and roles of requestors in a specific case. If a requestor is a party to a case, the court may provide electronic access to all information including personally identifiable information. If a requestor is a third party seeking access to a case opening documents the court may require that a FOIA request be made for electronic access and if granted provide the information subject to removal of any excepted information. If the requestor is a third party requesting other records held by the court, the electronic information can be provided stripped of all personal identification.

Should any party seek more electronic information than that provided, the court can provide for a hearing, and the requestor should make a showing of a particularized need to see the electronic information, such as is required to access a Presentence Investigative Report, or the hearing can be held to take evidence that a party is a creditor and should be added to a case and provided electronic access.

264. This treatment is found in practice in many courts. The state courts of Colorado have gone farther than most and instituted rules in that regard. *See* Office of the State Court Adm'r v. Background Info. Serv., Inc., 994 P.2d 420 (Colo. 1999); Background Info. Serv., Inc. v. Office of the State Court Adm'r, 980 P.2d 991 (Colo. Ct. App. 1998).

Shortcomings to this short term solution arise when a court accepts electronic filings, especially of case opening documents. In these circumstances, the electronic record is the official record and 11 U.S.C. §107 applies to determine access. To alleviate the impact of this problem, parties should not present case opening documents, and the courts should also not accept case opening documents, for electronic filing. At a minimum, parties should not electronically file any pleading requiring social security and tax identification numbers and account numbers, including case opening documents, applications to pay in installments and monthly operating reports.

CONCLUSION

In summary, changes in technology are harming individuals who are drawn into the bankruptcy system through violation of their constitutional rights to privacy in sensitive, personally identifying information. The public access levels provided to information in bankruptcy exceed and are inconsistent with public access levels to similar information in other contexts. These violations of privacy rights and the inconsistencies can be ended by changing the bankruptcy code, rules and forms to better distinguish that level of access required for the purposes of the general public seeking evaluation of the system, from that of creditors seeking to participate in a case. The methods presented seek to leave intact the "practical obscurity" of the current level of access with paper records, under which the open records requirement of 11 U.S.C. 107 was enacted, in our growing electronic environment.

